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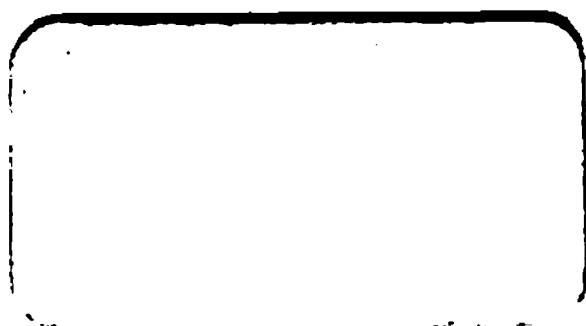
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA.

FROM MARCH 26, 1910, TO OCTOBER 13, 1910.

OFFICIAL REPORT.

VOLUME 41.

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OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

*THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH, THE HON. WILLIAM L. HOLLOWAY,	}	Associate Justices.
---	---	---------------------

OFFICERS OF THE COURT:

ALBERT J. GALEN, Attorney General.

W. L. MURPHY, Asst. Attorney General.

J. A. POORE, Asst. Attorney General.

†W. S. TOWNER, Asst. Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

*Re-elected November 8, 1910.

†Appointed October 1, 1910, to succeed Mr. E. M. Hall, resigned.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from June 25, 1910, to December 21, 1910.

ARMSTRONG, WM. G., June 30, 1910.

BALL, W. M., Nov. 18, 1910.

BAXTER, R. A., Nov. 18, 1910.

BEECHER, C. H., Dec. 12, 1910.

BERRY, ALBERT, Dec. 12, 1910.

BRASS, JULIUS H., Dec. 12, 1910.

BRATTEN, CARL L., Oct. 11, 1910.

BURKEY, LEVY M., Sept. 14, 1910.

BUSEY, GEO. C., Nov. 22, 1910.

CHOATE, I. W., Dec. 12, 1910.

COBURN, JOHN W., June 25, 1910.

COLBY, CHAS. G., Dec. 12, 1910.

CORCORAN, JOHN H., Oct. 31, 1910.

CORNISH, PERL C., Oct. 1, 1910.

COWLEY, STEPHEN J., June 25, 1910.

DE LIMA, H. E., June 27, 1910.

DILLETT, A. J., Oct. 10, 1910.

DUFF, HARDAMAN B., Nov. 16, 1910.

EDWARDS, THOS. J., Sept. 12, 1910.

FAIRLEY, LEON S., Nov. 22, 1910.

FELT, STANLEY E., July 7, 1910.

FLAHERTY, BERNARD B., June 25, 1910.

GOODISON, W. L. T., June 25, 1910.

HAYNES, F. F., Sept. 14, 1910.

HEINEMAN, EDWARD T., Nov. 23, 1910.

HILLS, CHAS. A., Sept. 21, 1910.

HOSMER, BEN W., Oct. 29, 1910.

JONES, JOHN D., Oct. 29, 1910.

KIRKLAND, IRA B., Nov. 10, 1910.

LEE, WM. M. J., Oct. 3, 1910.

LINN, C. A., Dec. 21, 1910.

McMARTIN, D. F., July 23, 1910.

MASTEN, WALTER, July 2, 1910.

MEYER, HARRY, Dec. 12, 1910.

MILLER, CLARENCE R., Oct. 5, 1910.

MILLER, HERSHEL F., Sept. 12, 1910.

MILLER, JAMES M., Sept. 26, 1910.

MILLS, R. McQUEEN, July 6, 1910.

MOORE, BEN HUB, Dec. 12, 1910.

MURPHY, PATRICK J., Dec. 12, 1910.

NICHOLS, EDMUND, June 27, 1910.

NOYES, ROY E., Nov. 17, 1910.

O'NEILL, DESMOND J., Dec. 12, 1910.

PHILLIPS, DIXON L., Oct. 28, 1910.

SAMUELL, H. P., Nov. 10, 1910.

SCHMIDT, A. J., Nov. 21, 1910.

SELTERS, JOHN B., Nov. 10, 1910.

SHOUDY, JOS. E., July 23, 1910.

SIDELL, WM. T., Oct. 1, 1910.

SIMMONS, HUBERT A., Apr. 11, 1910.

SMITH, RICHARD H., July 23, 1910.

SMITH, W. H., Dec. 12, 1910.

SWANBERG, A. V., Dec. 12, 1910.

SWEE, JOHN P., Nov. 21, 1910.

TYLER, G. L., Sept. 26, 1910.

WESTOVER, GEO. A., June 30, 1910.

WULLENWABER, EDGAR W., Sept. 13, 1910.

YOUELL, HAROLD H., Sept. 26, 1910.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1911.

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District Judges: Hon. James M. Clements; Hon. J. Miller Smith.

Officers: County Attorney, A. P. Heywood, Esq.; Clerk of District Court, F. L. Reece; Sheriff, M. L. Higgins.

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County of Silver Bow. County Seat, Butte.

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Officers: County Attorney, Thomas J. Walker, Esq.; Clerk of District Court, John J. Foley; Sheriff, John K. O'Rourke.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.

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Officers of Granite County (County Seat, Philipsburg)—
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Counties of Missoula, Ravalli and Sanders.

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Officers of Ravalli County (County Seat, Hamilton)—County Attorney, R. Lee McCullough, Esq.; Clerk of District Court, A. C. Baker; Sheriff, George Lee.

Officers of Sanders County (County Seat, Thompson Falls)—County Attorney, L. C. Rinard; Clerk of District Court, W. E. Nippert; Sheriff, S. L. Vanderpool.

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Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Llewellyn L. Callaway; Hon. Joseph B. Poindexter.

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Officers of Jefferson County (County Seat, Boulder)—County Attorney, Frank Showers, Esq.; Clerk of District Court, Wm. T. Sweet; Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City)—County Attorney, Julian A. Knight, Esq.; Clerk of District Court, Matt. Carey; Sheriff, N. J. Traufler.

SIXTH JUDICIAL DISTRICT.

Counties of Park and Sweet Grass.

District Judge: Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County Attorney, Fred L. Gibson, Esq.; Clerk of District Court, Arthur Davis; Sheriff, John Killorn.

Officers of Sweet Grass County (County Seat, Big Timber)—County Attorney, A. G. Hatch, Esq.; Clerk of District Court, F. M. Lamp; Sheriff, O. A. Fallang.

SEVENTH JUDICIAL DISTRICT.

Counties of Custer and Dawson.

District Judge: Hon. Sydney Sanner.

Officers of Custer County (County Seat, Miles City)—County Attorney, S. Walker, Esq.; Clerk of District Court, James G. Ramsay; Sheriff, Ben. Levalley.

Officers of Dawson County (County Seat, Glendive)—County Attorney, F. P. Leiper, Esq.; Clerk of District Court, Harry A. Sample; Sheriff, W. D. Wynn.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade and Teton.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls)—County Attorney, H. S. Greene, Esq.; Clerk of District Court, Geo. Harper; Sheriff, John A. Collins.

Officers of Teton County (County Seat, Chouteau)—County Attorney, D. W. Doyle, Esq.; Clerk of District Court, James Gibson; Sheriff, K. McKenzie.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.

District Judge: Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, Justin M. Smith, Esq.; Clerk of District Court, J. A. Johnston; Sheriff, A. H. Sales.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, Chas. P. Cotter, Esq.; Clerk of District Court, F. Bubser; Sheriff, Chas. P. Doggett.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.

District Judge: Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—County Attorney, Charles J. Marshall, Esq.; Clerk of District Court, J. B. Ritch; Sheriff, Wm. R. Woods.

Officers of Meagher County (County Seat, White Sulphur Springs)—County Attorney, W. L. Ford, Esq.; Clerk of District Court, F. H. Mayn; Sheriff, Geo. L. Williams.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—County Attorney, X. K. Stout, Esq.; Clerk of District Court, Sam. D. McNeely; Sheriff, A. J. Ingraham.

Officers of Lincoln County (County Seat, Libby)—County Attorney, John Cuffe, Esq.; Clerk of District Court, Philip R. Long; Sheriff, Frank R. Baney.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—County Attorney, B. L. Powers, Esq.; Clerk of District Court, C. H. Boyle; Sheriff, George Bickle.

Officers of Valley County (County Seat, Glasgow)—County Attorney, John Hurley, Esq.; Clerk of District Court, C. C. Beede; Sheriff, James R. Stephens.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Rosebud and Yellowstone.

District Judge: Hon. Sydney Fox.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, P. E. Allen, Esq.; Clerk of District Court, H. A. Simmons; Sheriff, F. S. Bachelder.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, C. L. Crum, Esq.; Clerk of District Court, D. J. Muri; Sheriff, N. G. McMullen.

Officers of Yellowstone County (County Seat, Billings)—County Attorney, Chas. A. Taylor, Esq.; Clerk of District Court, Lorin T. Jones; Sheriff, John C. Orrick.

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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, in force from and after January 4, 1909, see 37 Mont., page xxiii.

AMENDMENT OF THE RULES OF THE SUPREME COURT.

It is ordered that Rule XXII of the Rules of this court, relative to the admission of attorneys from other jurisdictions, be amended so as to read as follows:

Application, How Made.—Candidates for admission under this section may make application in open court at any time. Application must be made upon motion of the attorney general or one of his assistants, and upon the verified petition of the applicant, showing the facts recited in section 6385, Revised Codes, 1907, etc. (Promulgated October 5, 1909.)

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
MARCH TERM, 1910.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

KELLY, RESPONDENT, v. GRANITE BI-METALLIC CON.
MINING CO. ET AL., APPELLANTS.

(No. 2,710.)

(Submitted March 14, 1910. Decided March 26, 1910.)

[108 Pac. 785.]

*Water and Water Rights—Stored Waters—Findings—Equity
Cases—Review—Briefs—Failure to Point Out Evidence—Ef-
fect.*

Equity—Findings—Review.

1. The findings of the district court in an equity case, attacked on the ground of the insufficiency of the evidence to support them, will not be disturbed by the supreme court unless the evidence clearly preponderates against them.

Appeal—Briefs—Failure to Point Out Evidence—Presumptions.

2. Where the brief of appellant fails to point out evidence in support of his contention relative to a given subject, the supreme court will not search the record to find it, but indulge the presumption that there was no evidence on the point.

Waters and Water Rights—Stored Waters—Rights of Owners.

3. So long as water to the amount to which ditch owners are entitled is allowed to flow to the headgates of their ditches, they may not complain of the use of the water by others above them, whether they divert it from the sources of the stream or from water stored by them in a reservoir.

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

ACTION by Sidney A. Kelly against Annie M. Hynes and others. There was a decree in favor of plaintiff, and defendants, Annie M. Hynes, Thomas F. Hynes, and R. R. McLeod and the defendants Granite Bi-Metallic Consolidated Mining Company and Fred Burr & Granite Ditch Company appeal. Modified and affirmed.

Messrs. Word & Word and Mr. W. E. Moore submitted a brief in behalf of Appellants. Oral argument by *Mr. Lee Word*.

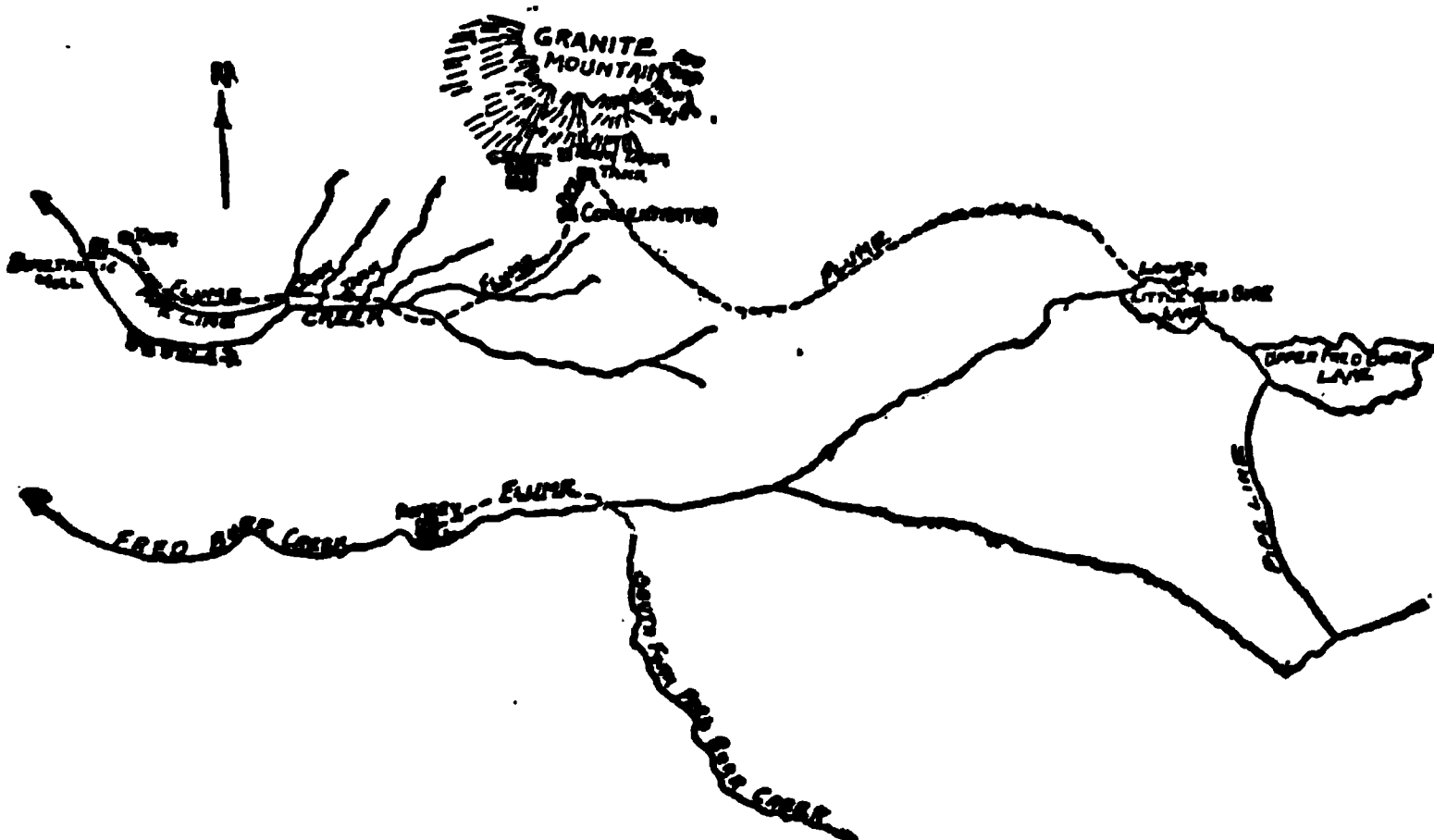
In behalf of Defendants Hynes and McLeod, there was a brief by *Messrs. Rodgers & Rodgers*, and oral argument by *Mr. W. E. Rodgers*.

Mr. Wingfield L. Brown filed a brief in behalf of Respondent Kelly, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to determine the rights of the plaintiff and the defendants Hynes and wife and McLeod to the use of the water flowing in Fred Burr creek, in Granite county, and to adjust the relative priorities and amounts of their respective appropriations. As indicated by the annexed outline

map, the stream has its sources on the west slope of the mountains, and flows into the valley toward the northwest.



At some distance below the junction of its three principal branches are situated agricultural lands, owned and occupied by the plaintiff and the defendants Hynes and McLeod. To irrigate these lands they have ditches, diverting water from the main stream near where it debouches into the valley. The Hynes ditch with its laterals is nearest to the mountains; those of the plaintiff and defendant McLeod are a short distance below, the latter being farthest down. When the action was originally instituted, it presented a controversy solely between the plaintiff and Hynes and wife; the allegations of the complaint being that these defendants at the time were diverting water to the use of which plaintiff was entitled by priority of appropriation, thus doing him irreparable injury. McLeod was made a defendant ostensibly because he was and is entitled to the joint use with plaintiff of the oldest right upon the stream, both holding under direct or mesne conveyances from a common predecessor, and because he was and is the owner of other rights based upon appropriations of later dates. Upon a *prima facie* showing made by Hynes and McLeod that the defendants Granite Bi-Metallic Consolidated Mining Company and the Fred Burr & Granite Ditch Company, hereinafter referred to

as the mining company and the water company, were causing the interference complained of by the plaintiff, and were in any event necessary parties to the action in order to determine all the conflicting rights, they were made parties defendant. The principal issues tried and determined arose upon the claim of right by the companies to maintain dams at the outlets of the lakes designated on the map as the Upper and Lower Fred Burr lakes, the apparent sources of the north branch of the stream, for storage of flood waters, and incidentally to divert into the upper lake, by means of a pipe-line, a portion of the water flowing in the middle fork of the stream, and to convey the water thus obtained by means of a flume to the town of Granite to supply its inhabitants, and also the mining and reduction works of the mining company at Granite and at the mill on Douglas creek below. Involved in this controversy was also the right, asserted by the companies, to increase their supply by diverting into the flume, by means of intakes, the water of small streams and springs issuing from the slope of the mountain above the line of the flume between the lakes and the town. The contention of the plaintiff and the other defendants was that the companies by these various devices seriously interfered with the natural flow of the stream, and thus deprived them of the amount of water to which they were entitled under their respective appropriations.

The mining company based its claim of a prior right to the use of the water, for the purpose for which it and its associate water company were diverting it, mainly upon three different appropriations; the first, made by one Degenhart, of 150 inches, in March, 1876; a second, made by one Owens, of 200 inches, in July, 1879; and a third, of 500 inches, made by one John McLeod, in 1886. In 1888 the Granite Mountain Mining Company, the immediate predecessor of the defendant mining company, acquired by mesne conveyances a one-half interest in the Degenhart right, and the entire interests of the owners of the other two. At that time these rights were appurtenant to, and were used to irrigate, the lands now owned

by the plaintiff. These lands were also acquired by the Granite Mountain Mining Company at the same time it acquired the water rights referred to. This company and the water company then began to divert water at the outlet of the Lower Fred Burr Lake. In the year 1889 they constructed a dam across the outlet of this lake, and thereafter conveyed water by means of the flume indicated on the map to the town of Granite, and to the reduction works of the Granite Mountain Mining Company. They also supplied the Bi-Metallic mill, then owned by an associated corporation known as the Bi-Metallic Mining Company. None of the water which was so diverted to the town of Granite or the works of the Granite Mountain Mining Company ever returned to Fred Burr creek, but such of it as escaped as waste or surplus flowed into Douglas creek. This condition continued until this company was succeeded by the mining company in 1898, which then became the owner of all of its property, as well as that of the Bi-Metallic Mining Company, with which it was then consolidated. In addition to the rights thus acquired, the Granite Mountain Mining Company and the water company also made various other appropriations in different amounts, ranging in date from April 11, 1887, to February 11, 1890, at points on tributaries of the stream, in the neighborhood of the lakes. This company also made appropriations on March 6, 1886, and on February 11, 1890, to supply water to its mill at Rumsey. The appropriation of the water to be conveyed by the pipe-line was made by the water company in January, 1902, and the line was completed during that year. The amount thus conveyed is between six and seven inches. In 1889, and in the following years, the companies also increased the height of the dam at the outlet of the lower lake, and erected another at the outlet of the upper lake, for the purpose of storing flood waters, in order to increase the supply and render it uniform. The water claimed under these later appropriations was diverted, either through the pipe-line into the upper lake, or through the intakes into the flume. On November 30, 1903, the defendant

mining company by deed conveyed to the plaintiff all its right, title and interest in the lands heretofore mentioned and now owned by him, together with its interest in the Degenhart, Owens and John McLeod water rights, reserving, however, and excluding from the grant, certain privileges in connection with the water rights, which are described as follows: "All the water of said Fred Burr creek which is tributary to Fred Burr lake, and all the water of said Fred Burr creek or Fred Burr lake which may have been at any time a portion of or part of said water rights herein mentioned, and which has been used or appropriated, or may be used or appropriated for any use whatever by the Fred Burr & Granite Ditch Company or its predecessors, which are tributary to said Fred Burr lake. * * *

The relationship which the mining and water companies sustain toward each other does not distinctly appear. What this relation is exactly is not important; for though they answered separately, and in the findings and decree are awarded separate rights under the appropriations made by the water company and the Granite Mountain Mining Company, the predecessor of the mining company, they claim the right to the joint use of the water diverted from the lakes by means of the flume and the intakes used in connection therewith, and were treated as joint owners by the court in its findings. It is sufficient to say that the water company is a subsidiary corporation, organized to supply the inhabitants of Granite and the employees of the mining company with water, as well as the mining company in its mining and reduction operations.

The plaintiff bases his claim upon a one-half undivided interest in the Degenhart right and in the Owens and John McLeod rights, conveyed to him by the defendant mining company. He avers that his right is superior to that of any of the other parties plaintiff and defendant, except that defendant McLeod has a joint interest with him in the Degenhart right, equal in dignity with his own right therein. McLeod bases his claim upon this half interest acquired by him in the Degenhart right through mesne conveyances from the original

appropriator, a second appropriation, alleged to have been made by a predecessor, of 300 inches, in 1882, and a third, made by the same predecessor, of 200 inches, in April, 1888. The defendants Hynes base their claim upon an appropriation of 200 inches, which is alleged to have been made in 1882 by a predecessor from whom they acquired the lands they now occupy, with the appurtenant water right. The plaintiff and defendants severally assert, as against each other, right to the amounts claimed by them, respectively, by adverse use for the period prescribed by the statute of limitations.

Upon the evidence the court made special findings as to the dates and amounts of the respective appropriations of the parties, and entered a decree fixing the relative rights and priorities, and enjoining each of them from interfering with the rights of any of the others. It found that no one of them had acquired a right by adverse user. It awarded to the plaintiff 75 inches under the Degenhart appropriation, as of the date of March 6, 1876; 100 inches under the Owens appropriation, as of the date of July 6, 1879; and 100 inches under the John McLeod appropriation, as of the date of December 4, 1886. To McLeod it awarded 75 inches under the Degenhart appropriation, 75 inches as of the date of December 1, 1882, and 150 inches as of the date of April 1, 1888. To the defendants Hynes it awarded 75 inches, as of the date of June 1, 1883. These rights amount in the aggregate to 650 inches. It found for the companies as to all the rights claimed by them by appropriation, except one of 2,000 inches of the water of Fred Burr lake, alleged to have been made on April 11, 1887, and certain ones which are alleged to have been made to supply the mill at Rumsey. As to these it made no specific findings. As to the right of the defendant companies to maintain their dams at the lakes and divert water therefrom, the court found as follows:

“Finding No. 15. That the average amount of water flowing in said Fred Burr creek below the dams constructed across said Fred Burr lakes by the said Fred Burr & Granite Ditch

Company and the said Granite Bi-Metallic Consolidated Mining Company, and hereinafter in these findings mentioned, each year, prior to and since the construction of said dams, has been not less than 650 inches of water."

"Finding No. 20. That during the irrigating season of each and every year since said dams were constructed by the said defendant companies, they have allowed and permitted to flow in said creek and out of said lakes, into and down the natural channel of said Fred Burr creek, not less than 650 inches of water.

"Finding No. 21. That the said defendants the Fred Burr & Granite Ditch Company and the said Granite Bi-Metallic Consolidated Mining Company have not during the irrigating season, since the construction of said dams, detained or deprived the plaintiff or either of said defendants Annie K. Hynes, Thomas F. Hynes, or R. R. McLeod, of the ordinary and natural flow or discharge of the waters of said Fred Burr creek as the same would naturally flow and run at such times.

"Finding No. 22. That the defendants the Fred Burr & Granite Bi-Metallic Consolidated Mining Company are the owners of and entitled to maintain and use, for the purpose of storing and conserving therein the waters of said Fred Burr creek and the said Fred Burr lakes, the said dams, and are entitled to store therein the waters of said creek and of said lakes, provided said defendant companies use the water in such a manner that every appropriator herein named, farther down the creek, shall have during the irrigating season of each year the use and enjoyment of said waters of said creek substantially according to its natural flow; and the said defendant companies at all times during the irrigating season of each year must turn down and permit to flow into the channel of said Fred Burr creek below said lakes, and below the said dams across said lakes, not less than 650 inches of water."

From the decree entered upon these findings and from an order denying their separate motions for a new trial, the defendant companies have appealed.

The only contention made is that the evidence is insufficient to justify the findings. Viewing them as a whole, we do not think the contention should be sustained. The evidence is voluminous, and, in some respects, in irreconcilable conflict. It would serve no useful purpose to enter into an analysis of it. We do not find that it clearly preponderates against any of the conclusions reached by the trial court, except in one particular hereafter noted, and, under the rule which must govern this court upon a review of the findings in such cases (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860), we do not feel justified in disregarding them or setting them aside.

One of the principal contentions made is that the court either misconstrued the deed from the mining company to the plaintiff of the lands now occupied by him and the appurtenant water rights, or that it disregarded it. Under the evidence, as we understand it, the question whether the reservation is effective, or is void, as is urged by the plaintiff and the other defendants, because it is inconsistent with the grant of the principal thing described in the deed, is wholly immaterial. Prior to the time the Granite Mountain Mining Company acquired the Degenhart, Owens, and McLeod rights, it had been obtaining its supply of water from springs adjacent to its mines and works. As the work of mining progressed, the sources of these springs were drained, and they failed. Thereupon those rights were acquired, and the water company was organized as a subsidiary company to perfect devices for the diversion of water and for its sale to the inhabitants of the town, as well as to provide a supply to be used by the company in its mining and reduction operations. It was immediately found that, if the supply was to be made sufficient to meet these requirements, it would be necessary to increase it by conserving the flood waters flowing into the lakes, and also to gather together and make available the small streams and springs along the line of the

flume. For this purpose the dams were constructed and the intakes were installed. These devices were improved during the two or three years following immediately upon the acquisition of the rights now claimed by the plaintiff. Finally, in 1902, the pipe-line was installed. In the meantime the Granite Mountain Mining Company and its successor, the mining company, were leasing the lands now owned by the plaintiff, and never at any time was any complaint made that the supply in the main stream was not sufficient to meet all the requirements for agricultural purposes, either by these lessees or the defendants Hynes and McLeod or their predecessors. During all these years the defendant companies had a supply to meet all their wants, which they were diverting entirely away from the slope from which the stream is supplied, so that neither the surplus nor waste could return to it. Further, the evidence tends to show, as the court found, that never at any time did the diversion of water by the companies lessen the natural flow in the main stream at the heads of the ditches of the plaintiff and the other defendants. It also tends to show that at no time during the irrigating season, even prior to the building of the dams, did any appreciable amount flow from the lakes down to the main stream through its north fork, but that this branch was supplied mainly by affluents issuing out of the slopes below the dams and the flume of the companies. The only inference possible from this evidence is that the companies relied for their supply, not upon the rights acquired by the purchase from Degenhart and others, because they could not do so, but upon the independent supply acquired by the storage of flood waters, the conservation of other small sources, and the small diversion by means of the pipe-line. So far as appears, they would have been found entitled to exactly the same rights as were decreed to them—and these are all to which they appear to have any just claim—if the reservation in the deed had not been made. We cannot gather definitely from anything in the record what view the trial judge took of this deed, and what, if any, effect he gave to the reservation. As

we have said, however, it is apparent that the same conclusion would have been reached by him, whatever may have been his view. We shall presume that he regarded it as not affecting the rights of the defendant companies as shown by the other evidence, and therefore shall not undertake to say whether the reservation is void or not.

It is argued that the court erred in impliedly finding against the companies as to the appropriation which is alleged to have been made on April 11, 1887, and those made to supply the mill at Rumsey. The first of these appropriations was made at the outlet of the lakes, for the purpose of securing the right to divert the flood water of the lakes, as well as whatever outflow there might be after the flood season was over. The flume was completed in 1889. It will be observed that the court found that the companies have the right to maintain their dams and divert water from the lakes, not confining them to the flood water merely, but leaving them to divert any water flowing therefrom; the only restriction imposed being that they do not interfere with the flow of the water in the stream below so as to decrease the flow below 650 inches. The findings award to these defendants all that they can justly claim under this appropriation, though it is not expressly mentioned.

Counsel for the companies do not call attention, in their brief, to any evidence which tends to show diligence in prosecuting the work of diversion under the appropriations for use in the Rumsey mill, nor to any showing that water was ever put to any actual use in the mill, or is now in use. We cannot undertake an independent examination of the large record in order to ascertain what the evidence is. In the absence of definite reference to it, we must presume that there was no evidence on the subject.

In view of the evidence heretofore referred to, touching the outflow from the lakes, we think the court was in error in finding that the companies have always permitted as much as 650 inches to flow over their dams. In fact, the evidence tends to show almost conclusively that, except at flood seasons, this outflow is

almost nothing, and that the volume of the stream is maintained at the heads of the ditches of the plaintiff and the other defendants by tributaries flowing into it below the dams. So long as this condition exists, the companies are under no obligation to permit any flow from their reservoirs, whether it consists of the natural outflow or of the conserved flood water. Therefore, while findings 20 and 22 are correct in declaring the fact to be that the companies have not at any time interfered with the flow of the water below the dams, and are therefore entitled to maintain them, they are erroneous in requiring these defendants to permit the amount to which the ditch owners are entitled in the aggregate to flow over the dams. Under the evidence this is impossible unless the trial court is to be understood as holding that, while the dams may be lawfully maintained for storage purposes, the companies must nevertheless use the stored water to keep up the flow of the stream for the benefit of the ditch owners, before they are entitled to divert any to their own uses. The most that the ditch owners are entitled to claim at any time is that the amounts to which they are respectively entitled shall flow to the headgates of their ditches. (*Sayre v. Johnson*, 33 Mont. 15, 81 Pac. 389.) They are entitled to nothing more. And since it appears that the companies have not at any time lessened this amount, the ditch owners have no just ground for complaint so long as this condition is maintained, whether the companies divert water from the sources of the stream or confine their use to the stored water. Doubtless this was the theory entertained by the trial court; but, as the findings stand, the ditch owners have the right to demand the use of water which, but for the devices resorted to by the companies, would never under any condition be available for any purpose. If the findings are reformed to meet the conditions as they actually exist, the companies will have no ground to complain, and the ditch owners will have secured all the rights to which they are entitled.

The cause is therefore remanded to the district court, with direction to reform the findings, so as to require nothing further

from the companies than that they do not by their diversions decrease the amount of the flow at the heads of the plaintiff's and defendants' ditches below 650 inches. When the decree shall have been modified in accordance with this direction, it will stand affirmed.

Modified and affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

(Submitted April 25, 1910. Decided May 2, 1910.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

A motion for a rehearing has been submitted by appellants herein, the purpose of it being to obtain a construction of the deed referred to in the original opinion, and to have the order modifying the decree made more specific. After further consideration of the case we are of the opinion that a construction of the deed will not add anything to the rights of the appellants, as they will be fixed by the decree as already modified. The order heretofore made herein is, however, changed to read as follows: "The cause is therefore remanded to the district court, with directions to modify its findings in accordance with the suggestions herein, and to modify the decree accordingly, so as to require nothing further from the companies than that they do not by their diversions decrease the amount of the flow at the heads of the plaintiff's and defendants' ditches below 650 inches. When the decree shall have been modified in accordance with this direction, it will stand affirmed."

The motion for rehearing is denied.

Rehearing denied.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

DUNSETH, RESPONDENT, v. BUTTE ELECTRIC RAILWAY
CO., APPELLANT.

(No. 2,792.)

(Submitted March 16, 1910. Decided March 26, 1910.)

[108 Pac. 567.]

*Directed Verdict—Judgment—When on Merits—Res Adjudi-
cata.***Directed Verdict—Judgment—Nature of.**

1. A judgment on a directed verdict may or may not be a judgment on the merits, dependent upon the question decided by the court and the scope of the ruling.

Judgment—Res Adjudicata.

2. A litigant has no right, as against the same adversary, to have a question, either of law or fact, relating to the same cause of action, twice adjudicated in the same or another court of like jurisdiction, unless a re-examination of it has been regularly ordered.

Same—Directed Verdict—Res Adjudicata.

3. Plaintiff brought an action in the circuit court of the United States against a street railway company to recover damages for personal injuries. The judgment in that court recited that, after the impaneling of a jury, evidence was submitted by both parties, and at its conclusion a verdict was directed in favor of defendant. Plaintiff subsequently instituted suit in the state court on the same cause of action against the same defendant. *Held*, that the judgment in the federal court was upon the merits, and a bar to the action in the state court.

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

ACTION by Sara Dunseth against the Butte Electric Railway Company. Judgment for plaintiff, and the defendant appeals. Reversed and remanded, with directions to enter judgment in favor of defendant.

There was a brief in behalf of Appellant by Mr. W. M. Bickford, Mr. George F. Shelton, and Mr. Charles A. Ruggles, and oral argument by Messrs. Shelton and Ruggles.

The direction of a verdict in the federal courts is a function which the court not only may perform, but which, in a proper case, it is bound to perform, and for failure to perform which

error may be assigned. (Rose's Code of Federal Procedure, pp. 866, 867, sec. 918a.) And the doctrine that a mere scintilla of evidence is not enough to prevent a federal court from directing a verdict is well established. (*Hinchman v. Lincoln*, 124 U. S. 49, 8 Sup. Ct. 369, 31 L. Ed. 337; *National Assn. v. Scott*, 155 Fed. 92, at 96, 83 C. C. A. 652; *Berbecker v. Robertson*, 152 U. S. 377, 14 Sup. Ct. 373, 38 L. Ed. 484; see, also, *Marande v. Texas etc. Ry.*, 184 U. S. 191; 22 Sup. Ct. 340, 46 L. Ed. 495; *Sloss Co. v. South Carolina Co.*, 85 Fed. 133, 29 C. C. A. 50; *Hodges v. Kimball*, 104 Fed. 750, 44 C. C. A. 193; *Turnbull v. Ross*, 141 Fed. 650, 72 C. C. A. 609.) Hence, a judgment on a directed verdict in a federal court, based upon full evidence, is not a mere judgment of nonsuit, but it is in all respects a judgment on the merits. (*Casey v. Pennsylvania Asphalt Paving Co.*, 109 Fed. 747, affirmed in 114 Fed. 189, 52 C. C. A. 145; see, also, *Briggs v. Waldron*, 83 N. Y. 582; *Burnett v. State*, 62 N. J. L. 510, 41 Atl. 719; *Andrews v. School District*, 35 Minn. 70, 27 N. W. 303; *Ordway v. Boston & M. Ry.*, 69 N. H. 429, 45 Atl. 243; *Aiken v. Lyon*, 127 N. C. 171, 37 S. E. 199.)

So far as this case is concerned, the matters fully adjudicated and concluded between the parties in the federal court were the same as the plaintiff is here attempting to again have tried. Such being the case, this court is bound to view the judgment of the United States circuit court pleaded in the answer in the same light, and to give it the same conclusive force and effect as that court itself would were the present case before it. (*Hyatt v. Challiss*, 59 Kan. 422, 53 Pac. 467; *Belcher v. Chambers*, 53 Cal. 635.) State courts are bound to conform their decisions to those of the federal courts on questions involving the construction of the constitution and laws of the United States. (*Clews v. Mumford*, 78 Ga. 476, 3 S. E. 267; *Bressler v. Wayne County*, 25 Neb. 468, 41 N. W. 356; *Moore v. Allen*, 3 J. J. Marsh. (26 Ky.) 612.) The decisions of the United States supreme court on questions as to the jurisdiction of the federal judiciary are controlling. (*Feusier v. Lammon*, 6 Nev. 209; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289.)

Now, the federal courts have construed the federal statute with reference to procedure in those courts so as to hold that the federal practice upon the direction of verdicts is uniform, regardless of state laws or practice to the contrary. (*Sloss v. South Carolina Co., supra.*) And those courts have held, as already stated, that a judgment on a directed verdict is a judgment on the merits.

The judgment in this case itself shows on its face that it was rendered upon a consideration of all the facts and evidence in the case adduced on both sides, and was a judgment on the merits; and, so far as that point is concerned, is fully in conformity with the rule set forth in the case of *Glass v. Basin & Bay State Min. Co.*, 34 Mont. 95, 85 Pac. 746, and in section 6717, Revised Codes.

In behalf of Respondent, there was a brief by *Messrs. Breen & Hogevoell*, *Mr. L. P. Donovan*, and *Mr. E. B. Melzner*, and oral argument by *Messrs. Hogevoell* and *Donovan*.

A judgment upon the merits can in no event be entered except where the case has been fully heard by the court, and where from all of the facts before the court it affirmatively appears that the plaintiff does not have a cause of action. Since a verdict may be directed upon the ground that plaintiff's complaint is insufficient (*Badovinac v. Northern Pac. Ry. Co.* (Mont.), 104 Pac. 543), or upon the ground that there is a variance between plaintiff's pleading and proof (6 Ency. of Pl. & Pr. 698), or upon any other ground which would be reason for granting a nonsuit, it appears clear, upon principle, that a directed verdict is not an adjudication of the merits of the controversy as distinguished from the merits of plaintiff's pleadings as then before the court, or variance between the pleadings and the proof.

Assuming for the purpose of argument that the judgment entered upon a directed verdict may in some instances be an adjudication upon the merits, we submit that when a party relies upon such a judgment as an adjudication upon the merits

barring a subsequent suit, it is incumbent upon him to show that the motion for a directed verdict was based and granted upon some ground or grounds which went to the merits of the controversy.

The decisions in *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999, *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675, and *Cummings v. Helena etc. Co.*, 26 Mont. 434, 68 Pac. 852, show that this court has uniformly treated a directed verdict as a nonsuit and nothing more; and as a verdict may be, and ordinarily is, directed upon those grounds which are prescribed as the basis for a nonsuit by the statute (Revised Codes, sec. 6714), it should be treated merely as a nonsuit and not as an adjudication upon the merits. This view finds support in the decisions of other jurisdictions. (*Couch v. Welsh*, 24 Utah, 36, 66 Pac. 600; 6 Ency. of Pl. & Pr. 694.)

If by virtue of some rule of practice peculiar to the federal court, but unknown to our state courts, a judgment entered upon a directed verdict is by the federal court itself regarded as an adjudication upon the merits, then such fact should have been pleaded by the defendant in support of its judgment, and should have been proved by the defendant. (See *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; *Chicago Ry. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519; Wharton on Conflict of Laws, sec. 652.)

MR. JUSTICE SMITH delivered the opinion of the court.

This is an action brought in Silver Bow county to recover damages for personal injuries alleged to have been received by the plaintiff while alighting from a car of the defendant company on which she had been a passenger in the city of Butte. The defendant McConkey is alleged to have been the conductor, and the defendant Lang, the motorman, in charge of the car. The injuries complained of were sustained on May 29, 1907. The cause of action is based upon the allegation in the complaint that while the plaintiff had one foot upon the ground, and was in the act of alighting from the car, which had been

brought almost to a standstill at the corner of Montana and Platinum streets, where she had previously signified to the conductor her desire to get off, the defendants negligently "jerked the car from under her," and caused her to fall to the ground, whereby she was injured. She alleges that, "had it not been for the jerk," she could have alighted with safety. The defendants answered separately, by (1) denying all of the allegations of the complaint, except the formal parts thereof, and the averment that plaintiff was a passenger on the car in question; and (2) by alleging affirmatively "that on or about the first day of November, 1907, in the circuit court of the United States, ninth circuit, district of Montana, there was an action pending between Sara Dunseth, plaintiff, and the Butte Electric Railway Company, a corporation, and August Rundblad, defendants; that the said Sara Dunseth, plaintiff therein, is the same Sara Dunseth, the plaintiff herein, who has brought this suit; that the Butte Electric Railway Company, the defendant therein named, is the same Butte Electric Railway Company that is made defendant in this suit; that the plaintiff in and by the complaint therein, claimed damages for personal injuries upon the same cause of action as herein set forth in the complaint filed in this cause; that the injuries alleged to have been suffered by the plaintiff therein, are the same as the injuries alleged to have been suffered by the plaintiff in this cause; and the facts alleged in said complaint therein are the same as those alleged herein, and the same cause of action was relied upon as a ground of recovery therein as that set forth in the complaint herein; that an answer to said complaint was duly filed by the said defendant Butte Electric Railway Company therein; that the replication thereto was filed by the plaintiff, and the said cause of action, being at issue, came on for trial in said United States circuit court for the ninth circuit, district of Montana, on or about the first day of November, 1907, before the court and a jury of twelve persons, duly impaneled and sworn to try the issues in said cause; that thereupon witnesses on behalf of the plaintiff were sworn and testified, witnesses were sworn and

testified on behalf of the defendant, and witnesses were sworn and testified in rebuttal; and the evidence being closed, and each party then and there announcing in open court that it had no further testimony to offer in said cause, the jury were instructed by the court, and thereupon returned into court their verdict in favor of the defendant Butte Electric Railway Company and against the plaintiff; and thereafter judgment upon the merits was duly given and made in favor of the defendant Butte Electric Railway Company and against the plaintiff, which said judgment so given and made was upon the merits, and not otherwise, and is as follows, to-wit: '(Title of Court and Cause.) Judgment. The above-entitled cause coming on regularly to be heard, the respective parties being present in court, represented by their counsel, and announcing themselves ready for trial, the said action was dismissed, on motion of the plaintiff, against the defendant August Rundblad; whereupon a jury of twelve good and lawful men was impaneled to hear and try said cause, and evidence was submitted upon the part of the plaintiff and the defendant, and at the time when all of the evidence in the case had been submitted by the respective parties to said action, on motion of counsel for defendant, the court, having under consideration all of the evidence introduced in said action, and being fully informed in the premises, ordered and directed that a verdict should be rendered in favor of said defendant and against the plaintiff herein: Now, therefore, in consideration of the premises, and of said verdict, it is ordered, adjudged and decreed that the plaintiff herein take nothing by her said action, and that the defendant Butte Electric Railway Company go hence without day, and that said defendant Butte Electric Railway Company have judgment for its costs and disbursements herein expended.' That by virtue of said judgment, and by reason of the proceedings hereinbefore set forth, the cause of action sued upon by the plaintiff herein has been fully determined and adjudicated by the judgment upon the merits hereinbefore set forth, and the plaintiff has no further right to proceed in this case upon the same cause of

action, tried and determined upon the merits in the former case."

Plaintiff's replication to the affirmative allegations just quoted is as follows: "Admits that on or about the first day of November, 1907, in the circuit court of the United States, ninth circuit, district of Montana, there was an action pending between Sara Dunseth, plaintiff, and Butte Electric Railway Company, a corporation, and August Rundblad, defendants; that the said Sara Dunseth, plaintiff therein, is the same Sara Dunseth, the plaintiff herein, who has brought this suit; that the Butte Electric Railway Company, the defendant therein named, is the same Butte Electric Railway Company that is made defendant in this suit; that the plaintiff, in and by the complaint therein, claimed damages for personal injuries upon the same cause of action as herein set forth in the complaint filed in this cause; that the injuries alleged to have been suffered by the plaintiff therein are the same as the injuries alleged to have been suffered by the plaintiff in this cause; and the facts alleged in said complaint therein are the same as those alleged herein, and the same cause of action is relied upon as a ground of recovery therein as that set forth in the complaint herein; that an answer to said complaint was duly filed by the defendant Butte Electric Railway Company therein; that the replication thereto was filed by the plaintiff; and the said cause being at issue, came on for trial * * * before the court and jury of twelve persons, duly impaneled and sworn to try the issues in said cause; that thereupon witnesses were sworn and testified on behalf of the plaintiff, witnesses were sworn and testified on behalf of the defendant, and witnesses were sworn and testified in rebuttal; that the following judgment was given and made (setting forth a copy of the same judgment pleaded in the answers). Denies, on information and belief, each and every other allegation in said further and separate answer contained."

We have quoted the replication thus at length, for the reason that it appears to have been drafted with a view of inviting a motion for judgment on the pleadings, and thus clearly pre-

senting the question of law involved. It will be observed that the only denial in the replication is on information and belief, and relates to the allegation in the answer that the judgment of the federal court was upon the merits. A motion for judgment on the pleadings was duly made by the Butte Electric Railway Company. This motion was denied, the cause was tried, and a verdict returned in favor of the plaintiff and against that defendant on April 3, 1909, for the sum of \$5,000. Judgment was entered on the verdict, a new trial denied, and the defendant company has appealed. The verdict is silent as to the individual defendants, making no reference to either of them; neither are they referred to in the judgment. The record in cause No. 2,794, which was argued and submitted with this appeal, discloses the fact that on June 25, 1909, plaintiff's counsel moved the court for an order dismissing the action as to the defendants McConkey and Lang, and on July 31, 1909, over objection of the defendant Butte Electric Railway Company, the order was made.

Several questions are discussed in the briefs of counsel, but the fundamental one is whether the judgment entered in the United States court was a judgment upon the merits, and therefore a bar to the present action. A solution of that question renders a consideration of others unnecessary, and for the purpose of arriving at it we shall assume that the issue is properly presented by the replication.

It is contended by the appellant's counsel that a judgment on a directed verdict is always and necessarily a judgment upon the merits. The following cases are thought to sustain the position: *Briggs v. Waldron*, 83 N. Y. 582; *Burnett v. State*, 62 N. J. L. 510, 41 Atl. 719; *Andrews v. School District*, 35 Minn. 70, 27 N. W. 303. We, however, are not inclined to go so far in our ruling; but are rather of opinion that a judgment on a directed verdict may or may not be a judgment upon the merits, dependent upon the question decided by the court and the scope of the ruling. It is not necessary that a question of fact should actually have been decided, in order to constitute a thing adjudi-

cated between the parties. If it be true, as apparently indicated by the pleadings in this case, that the cause came on for trial in the district court of Silver Bow county upon exactly the same state of the pleadings as had previously been presented to the federal court, then, whatever technical question of pleading may have been decided by the latter court, became a thing adjudicated, so far as the state court was concerned, and, as the point decided disposed of the entire case, then the entire case became *res judicata* upon that state of the pleadings. If the plaintiff was dissatisfied with the ruling of the federal court, it was her privilege to appeal. She had not the right, however, to make the same record in the state court and ask that court, in effect, to reverse the ruling of the federal court. A litigant has no right, as against the same adversary, to have a question, either of law or fact, relating to the same cause of action, twice adjudicated, in the same court or another court of like jurisdiction, unless a re-examination of the question has been regularly ordered. (See *Kleinschmidt v. Binzel*, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460; *Agnew v. McElroy*, 10 Smedes & M. (Miss.) 552, 48 Am. Dec. 772.) And an erroneous ruling is just as conclusive as a correct one, if allowed to become final.

But we have no difficulty in arriving at the conclusion, from a mere inspection of the judgment of the federal court, in the light of admissions in the pleadings, that the question determined was that, upon the facts in the case, the defendant as a matter of law was entitled to a final decision in its favor. The admissions in the pleadings, supplemented by a copy of the judgment of the federal court, supply all of the information that could be derived from an inspection of the judgment-roll. Section 6717, Revised Codes, declares: "A final judgment dismissing the complaint, either before or after trial, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon its merits." This judgment does not expressly declare that it was rendered upon the merits. Neither does it in terms dismiss the complaint. Considerable confu-

sion has arisen because of the fact that the expression "upon the merits" has often been loosely or thoughtlessly employed. Black says: "We must not lose sight of the fact that a judgment, although not upon the merits, and therefore not conclusive in respect to the very cause of action, may still be final as to the precise point upon which the determination was based." (2 Black on Judgments, sec. 693.) There is a wide distinction between the merits of the whole controversy, and the merits of some particular question. As an illustration: A judgment rendered on a demurrer may or may not be a judgment on the merits, depending upon the circumstances of each case. (*Glass v. Basin & Bay State Min. Co.*, 35 Mont. 567, 90 Pac. 753.) And so with a judgment of involuntary nonsuit. (*Ordway v. B. & M. R. R.*, 69 N. H. 429, 45 Atl. 243.) There are many authorities in conflict with the case last cited, but we think the reasoning of the New Hampshire court is unanswerable. A judgment against the plaintiff on the merits, in the broadest sense of the expression, determines that he has no cause of action against the defendant. In a more restricted sense the words are sometimes used to indicate that he cannot recover in the particular form of action. (See *Glass v. Basin & Bay State Min. Co.*, *supra*.) In the first instance he is permanently out of court; in the second, he may restate his case so as to disclose the cause of action that he has. But he cannot claim a right in that action to have the precise question, theretofore decided against him, again determined by the court, unless a re-examination has been regularly ordered. He may, however, as was pointed out by Mr. Justice Holloway, in *Glass v. Basin & Bay State Min. Co.*, *supra*, supplement his original pleading by additional allegations which complete the statement of a good cause of action. For the purposes of this appeal we shall treat the expression "upon the merits" as though it were employed in its broadest sense.

There is nothing in the pleadings or upon the face of the judgment to indicate that it was rendered because of a mere defect of form; or because of any technical omission in the

plaintiff's pleadings; or on account of variance between pleadings and proof. And the suggestion naturally occurs, if such had been the case, why the fact was not set forth in the replication, at the time when the plaintiff, with so great particularity of detail, was narrating what did actually take place in the federal court, in contradiction of the allegation of the defendant that the cause was there decided upon its merits. Instead of doing so, she denied, on information and belief, that the same was so decided, when she must have known what actually took place.

Under the practice in vogue in this state now and at the time of the trial in the federal court (see section 6761, Revised Codes), the judge may direct the jury to render a verdict in favor of the party entitled thereto, where, upon the trial of an issue by such jury, the case presents only questions of law. It was intimated by this court, in *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999, *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675, and *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, that the action of the court in directing a verdict is, in effect, the same as granting a nonsuit. This statement is true so far as it goes; that is to say, directing a verdict may have the same effect as granting a nonsuit. But the two modes of procedure differ in principle. A motion for a directed verdict may reach a situation which could not be reached by a motion for a nonsuit. For instance: The plaintiff may be able to establish a *prima facie* case; the defendant offers in bar affirmative matter which the plaintiff is unable to contradict or disprove. A motion for a directed verdict is properly interposed in such case, and this we believe to be the usual and ordinary practice. A motion for a directed verdict is sometimes made after the close of the evidence, in order to again raise the same point involved in the motion for a nonsuit, and sustained, the court having changed its mind in the meantime. In such case the motion serves the same purpose as a motion for a nonsuit. But the practice is not technically proper. It will be observed that section 6761,

Revised Codes, *supra*, permits a directed verdict when the case presents only questions of law. This section in nowise enlarges the powers of the court as applied to the facts. (*Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.)

It is contended by the appellant that the federal courts have greater latitude in dealing with the weight of the evidence than have the state courts, and this is perhaps true. (See *Sloss I. & S. Co. v. South Carolina & G. R. Co.*, 85 Fed. 133, 29 C. C. A. 50; *Hodges v. Kimball*, 104 Fed. 745, 44 C. C. A. 193; *Turnbull v. Ross*, 141 Fed. 649, 72 C. C. A. 609.) But the difference in procedure, while it may serve to emphasize counsel's argument, does not affect the merits of the question we are considering. A determination by a court that, upon all the facts in the case, the plaintiff is not, as a matter of law, entitled to recover, is just as binding and conclusive upon him as a determination by the court or jury that his witnesses are not entitled to credit, and that he ought not to recover for that reason. In its ultimate effect we can see no difference in principle between a directed verdict and one not directed. It is only when the vital, deciding facts stand proven, and undisputed in effect, as well as in terms, that the court may direct a verdict. Another way to reach the same result is for the court to tell the jury that if they find the facts as so proven (which they necessarily must), then their verdict should be for plaintiff or defendant, as the case may be. But such verdict no more determines the cause on the merits than does a verdict dictated by the court. The result in principle is exactly the same. It expresses the judgment of the court and not that of the jury. So that it is not necessary in this case to predicate our decision, in any degree, upon any difference in practice or procedure between the federal courts and the state courts. The circuit courts of the United States are courts of general jurisdiction, corresponding in authority, in a general way and in their wider spheres, with the district courts of this state. Full faith and credit must be given to their records and proceedings. (2 Black on Judgments, sec. 938.)

It appears from the admissions in the pleadings and from the judgment pleaded that the cause was at issue in the United States court; that an issue of fact, necessitating the presence of a jury, was ready for trial; that, after the jury was impaneled, evidence was submitted by both parties—that is to say, the plaintiff produced evidence tending to establish the facts set forth in her complaint (it is so admitted in the pleadings), and evidence was offered on the part of the defendant. The presumption is that the plaintiff's evidence as to how the accident occurred was a truthful narration of the facts, and differed in no substantial respect from that which she must offer in the district court. It is significant that witnesses were sworn and testified, in rebuttal, showing that every opportunity was given and accepted to bring out all of the facts. Indeed, each party announced, as is customary under such circumstances, that it had no further evidence to offer. Thereupon the defendant moved for a directed verdict, and we will assume, for the benefit of the plaintiff, notwithstanding the fact that the cause was being tried in a federal tribunal, that the court did not consider the weight of the evidence, but that the ground of the motion was that, as a matter of law, the defendant was entitled to a verdict. Thereupon the court, "having under consideration all of the evidence introduced in said action and being fully informed in the premises," directed the jury to render a verdict for the defendant. It seems to us that the conclusion is inevitable, from the language employed, that the court, applying the law to the facts, decided that, upon those facts, the plaintiff had no cause of action against the defendant. We do not see how the matter could be made plainer or how it can be claimed, in view of the express declaration of the federal judge that he had the evidence under consideration in granting the motion, that the result was reached on account of some defect or omission in the pleadings. It is argued that, for aught that is shown by the record, the court may have determined that there was a fatal variance between the pleadings and proof, and have granted the motion for that

reason. There is not any suggestion to that effect in the judgment; and it is admitted in the replication that the same cause of action was relied upon as a ground of recovery, and that the facts alleged in the complaint were the same as those alleged in the state court. The individual defendant Rundblad was dismissed from the case before the jury was impaneled; so that it is not to be supposed that his having been joined as a party was the reason for directing a verdict; the only reasonable conclusion, judging from the state of the record, is that the cause went to trial against the corporation defendant solely on the ground that it was liable upon the principle expressed by the maxim "*respondeat superior*." Such is the gravamen of the complaint in this case, admitted to be the same in its statement of facts as the complaint in the former action. The identity of the servant who caused the car to be "jerked" is of no importance, so far as the liability of the railway company is concerned. But the most significant fact, as shown by the judgment pleaded, is that the federal court did not confine itself to a determination that the plaintiff's complaint should be dismissed, but went further, and adjudged that, in view of the facts, the defendant was entitled to a verdict against the plaintiff. It was an ancient principle of the common, as well as the Roman, law, that there should be a speedy and final determination of litigation.

We conclude, therefore, that the appellant's motion for judgment upon the pleadings should have been granted. The judgment appealed from and the order denying a new trial are therefore reversed, and the cause is remanded to the district court of Silver Bow county, with directions to enter a judgment in favor of the appellant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY. and MR. JUSTICE HOLLOWAY
concur.

Rehearing denied, April 30, 1910.

PAINE ET AL., APPELLANTS, v. BRITISH-BUTTE MINING
CO., RESPONDENT.

(No. 2,798.)

(Submitted March 17, 1910. Decided March 26, 1910.)

[108 Pac. 12.]

*Conversion—Complaint—Ownership of Property—Demurrer—
Ambiguity and Uncertainty—Appeal.*

Appeal—Demurrer—Grounds—When Ruling Affirmed.

1. An order of the district court, general in terms, sustaining a demurrer which attacked the complaint on several grounds, will be upheld on appeal if justifiable upon any one of the grounds urged.

Conversion—Complaint—Ownership and Possession.

2. In an action for conversion the plaintiff must allege a general or special ownership in the property in controversy, and a right to the immediate possession of it at the time of the conversion.

Same—Ownership—Pleadings—Title—Sufficiency—How Determined.

3. Plaintiff in conversion may, in pleading ownership of the property in him at the time of the wrong complained of, set forth the links in his chain of title, and if he follows such statement by a declaration that "thereby" or "by virtue thereof" he became the owner, the sufficiency of such concluding allegation must be tested by the facts set forth in the deraignment of title.

Same—Ownership—Complaint—Deraignment of Title—Sufficiency—How Determined.

4. Where plaintiff in an action in conversion, instead of directly alleging ownership in him at the time of the conversion, merely states facts from which his title may be inferable, title in him must be the inevitable inference from the facts stated, else the complaint is vulnerable to demurrer for ambiguity and uncertainty.

Same—Ownership—Complaint—Insufficiency—Demurrer.

5. *Held*, under the rules stated in paragraphs 3 and 4 above, that the complaint, in an action for the conversion of corporate stock, which, while alleging that the owners of the stock had for a valuable consideration transferred and assigned in blank the certificates representing it, "and delivered the same to plaintiffs, who thereby became and were owners and holders thereof," failed to state that any consideration passed from plaintiffs, or that the certificates were delivered with the intent to transfer title to plaintiffs, or that they had been transferred or assigned to them, was demurrable for ambiguity and uncertainty, the allegations being as consistent with the idea of ownership in some third person as with that of ownership in plaintiffs.

MR. JUSTICE SMITH dissents.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by William A. Paine and others, copartners under the firm name of Paine, Webber & Co., against the British-Butte Mining Company. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Messrs. Forbis & Evans, and *Mr. John E. Corette*, submitted a brief in behalf of Appellants; oral argument by *Mr. Corette*.

In behalf of Respondent, there was a brief by *Messrs. Kirk, Bourquin & Kirk*, and oral argument by *Mr. William R. Kirk*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

A demurrer having been sustained to the third amended complaint filed in this action, and plaintiffs, having declined to plead further, suffered judgment to be rendered and entered against them, and appealed to this court.

The complaint in question alleges that the plaintiffs are copartners, doing business as Paine, Webber & Co.; that the defendant is a corporation having its principal office in Butte, with its president and secretary residing there; that it has a capital stock, represented by shares evidenced by stock certificates, and that the president and secretary are authorized to make transfers of stock upon the records of the corporation. It is then alleged that on February 1, 1908, N. J. Lloyd and Burt Adams Tower each owned 2,500 shares of the capital stock of the defendant company, and each held a certificate evidencing his ownership. The complaint then contains this allegation: “(5) That on the first day of February, 1908, the said Lloyd and Tower for a valuable consideration transferred and assigned the said shares of stock and the certificates representing the same in blank, and delivered the same and the whole thereof to these plaintiffs, who thereby became and were owners and holders thereof, and entitled thereto, and entitled to have the same transferred upon the books of the said de-

fendant company." It is further alleged that plaintiffs presented the said certificates to the officers of the defendant company, at its office in Butte, and demanded that the stock be transferred of record and new certificates issued to plaintiffs in lieu of the certificates so presented; that the defendant and its officers neglected and refused to make such transfer or to issue or deliver to plaintiffs new certificates representing the shares of stock so sought to be transferred, and by reason of such refusal the defendant company thereby converted such shares of stock to its own use. The complaint then sets forth the damages which plaintiffs have sustained by reason of the alleged conversion, and concludes with the usual prayer. The demurrer attacks the complaint on the ground, among others, that it is ambiguous and uncertain. The order of the court is a general one, and if any ground to the demurrer will justify the court's ruling, it must be sustained.

In an action for conversion the plaintiff must allege a general or special ownership in the property and a right to the immediate possession of it at the time of the conversion. (*Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413.) "It is sufficient to allege merely that at the time of the conversion the plaintiff was the owner and entitled to the immediate possession of the goods. Such an averment is an affirmation of a fact, and is not open to the objection that is a mere legal conclusion." (21 Ency. of Pl. & Pr. 1063.) But the plaintiff is not confined to this particular form of pleading. He may set forth the facts showing his title and right of possession. "Allegations respecting title, being averments of material and traversable facts, must be clear and precise; but certainty to a common intent seems all that is necessary, and it has been held that where the inevitable inference from facts alleged and from all the averments of the pleading construed together is that either realty or personalty is the property of a named person, the pleading is not demurrable by reason of failure to make a clear and specific

averment of title.” (21 Ency. of Pl. & Pr. 715.) “Where, however, the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon.” (*Gruwell v. Seybolt*, 82 Cal. 7, 22 Pac. 938.) If the plaintiff undertakes to deraign his title and follows the facts stated, by the declaration that “thereby” or “by virtue thereof” the plaintiff became the owner, such concluding declaration will not be treated as an allegation of ownership, but as the mere consequences flowing from the facts of deraignment set forth. (*Turner v. White*, 73 Cal. 299, 14 Pac. 794; 21 Ency. of Pl. & Pr. 719.) In other words, under such circumstances the concluding declaration does not add anything whatever of virtue to the pleading, but its sufficiency will be tested by reference to the facts set forth in the deraignment. As against a special demurrer for ambiguity and uncertainty, a complaint is not sufficient which merely alleges facts from which title in plaintiff may be inferable. If the direct allegation of ownership is not employed, then title in plaintiff, as distinguished from title in anyone else, must be the inevitable inference from the facts stated. (31 Cyc. 49, 81; 21 Ency. of Pl. & Pr. 716.)

It is true that the allegations of this complaint are not inconsistent with the idea of plaintiffs’ ownership: but that is not sufficient. As was said by this court, in *Becker v. Commissioners*, 11 Mont. 490, 28 Pac. 1116: “But, because the language of a pleading is not inconsistent with a state of facts, that is not alleging such state of facts. The complaint must allege the cause of action, and not simply set up matter which happens not to negative a cause of action. The cause of action must be found in the words of the complaint.”

The complaint alleges that Lloyd and Tower for a valuable consideration transferred and assigned their shares of stock, and the certificates representing the same, in blank, and delivered them to plaintiffs. There is not any allegation that the consideration passed from the plaintiffs, nor that the certifi-

cates were delivered with the intent to transfer title to plaintiffs; nor, indeed, that they were transferred or assigned to plaintiffs. For the sake of illustration merely, let us assume that John Doe furnished the money to purchase these certificates and delivered it to plaintiffs with directions to them to purchase the stock for him; that plaintiffs undertook to do so gratuitously; that they purchased the stock for Doe, paying Doe's money for it, and that Lloyd and Tower each thereupon assigned his certificate in blank and delivered it to plaintiffs. Under such circumstances every allegation of this complaint would be literally true, and yet the stock would belong to John Doe, and the plaintiffs would not have any interest in it whatever. This illustration is employed merely to show that under possible circumstances the allegations of the complaint are just as consistent with the idea of ownership in some third person, as with the idea of ownership in plaintiffs themselves. "The pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them." (*Langsdale v. Woollen*, 120 Ind. 78, 21 N. E. 541; 31 Cyc. 72.)

If the facts are that Lloyd and Tower, for a valuable consideration passing to them from plaintiffs, assigned their certificates in blank, and delivered them to plaintiffs for the purpose and with the intent of transferring ownership to plaintiffs, then the complaint could properly allege that Lloyd and Tower sold, assigned and transferred their stock to plaintiffs, and those facts would fully sustain the allegation. There is not any excuse whatever for uncertainty in this pleading. In the complaint now under consideration plaintiffs have made their fourth attempt to state a cause of action which they could have stated by employing the general allegation of ownership and right of possession, in common use in actions for conversion, or the form of allegation indicated above. The language employed by this court in *Becker v. Commissioners*, above, is applicable here: "It was such a simple matter to allege these facts constituting a cause of action—the appellant had such abundant opportunity to allege them, if they were

true—and as he refused to do so, apparently with deliberation, it would seem that the pleader considered that he had set out his alleged cause of action as fully as the facts warranted.”

We think the complaint is ambiguous and uncertain, and that the district court was fully justified in sustaining the special demurrer which pointed out the objection we have considered. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH: I dissent. The decision is too technical. In my judgment the allegation that plaintiffs “thereby became the owners and holders thereof,” while somewhat in the nature of a conclusion, should be considered as supplementing the preceding allegations. No harm can result from requiring the defendant to answer, thus enabling the court to pass upon the actual facts in the case.

RUMPING, APPELLANT, v. RUMPING, RESPONDENT.

(No. 2,797.)

(Submitted March 17, 1910. Decided March 26, 1910.)

[108 Pac. 10.]

Divorce—Suit Money—Necessity—Proof—New Trial—Grounds—Equity Cases—Rulings on Evidence—Review.

Divorce—Suit Money—Burden of Proof.

1. Defendant in an action for divorce was not bound to show affirmatively, on her application to have plaintiff pay into court money sufficient to defray costs already incurred and those to be incurred in presenting her motion for a new trial, that the application was made in good faith and that there was a probability of her ultimate success in the litigation, before the court could properly act upon it.

Same—New Trial—Grounds.

2. While the district court, in adopting the findings of the jury and making special findings of its own, in favor of plaintiff in a divorce suit, necessarily passed adversely on the grounds specified by defendant in her notice of intention to move for a new trial, to-wit, that the evidence was insufficient to justify the findings and decision of the

court, and that the decision was against law, it could nevertheless again pass upon them in considering the motion.

Equity Cases—Rulings on Evidence—Review.

3. The rule that the supreme court will not order a reversal in equity cases on the ground that the trial court improperly admitted or rejected evidence, has no application where the evidence in question was of import, and it is not reasonably apparent that the error complained of did not result in prejudice.

Divorce—Suit Money—Necessity—Proof.

4. On her application for suit money in an action for divorce, the movant must show a necessity for the allowance asked; if she has sufficient means of her own to meet the costs of suit, the application should be denied.

Same—Suit Money—Allowance—When Error.

5. It was error to allow the wife a larger amount of suit money, in an action for divorce, than the testimony showed was necessary for the purpose to which it was to be applied.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by John H. Rumping against Eva Rumping. From an order allowing defendant \$50 suit money, and \$150 to cover the cost of the stenographer's transcription of his notes, plaintiff appeals. Modified and affirmed.

In behalf of Appellant, there was a brief and oral argument by *Mr. E. A. Carleton*.

Messrs. Clayberg & Horsky filed a brief in behalf of Respondent; *Mr. John B. Clayberg* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was heretofore before this court on appeal by defendant from a judgment in favor of the plaintiff. (*Rumping v. Rumping*, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A., n. s., 1197, 12 Ann. Cas. 1090.) The judgment was reversed, and thereafter the defect in the complaint, which was pointed out by this court, was cured by amendment. The cause, having been brought to issue and transferred to Lewis and Clark county for trial, was tried, and a general verdict in plaintiff's favor returned. The district court adopted the jury's finding, made.

some specific findings of fact, and rendered judgment in plaintiff's favor, dissolving the bonds of matrimony. On April 5, 1909, the defendant gave notice of her intention to move for a new trial, specifying as the grounds thereof (1) insufficiency of the evidence to justify the findings made; (2) insufficiency of the evidence to justify the decision of the court; (3) the decision of the court is against law; (4) errors of law occurring at the trial and excepted to by this defendant; and further gave notice that the motion would be made upon a bill of exceptions thereafter to be prepared. On April 10, the defendant filed and served her notice of motion, and motion for an order of court directing the plaintiff to pay into court, for the use of defendant, an amount of money sufficient to defray costs already incurred, to pay further expense of litigation, and to pay for a transcription of the stenographer's notes of the testimony and proceedings had upon the trial, for the preparation of her bill of exceptions. This motion was supported by the affidavit of defendant, which, after itemizing the expense already incurred, alleges that the transcript of the stenographer's notes will cost "approximately \$100," and that to further prosecute her motion for new trial will cost her \$50. Upon the hearing of this motion affidavits, oral testimony, and documentary evidence were presented, and upon consideration thereof the court made an order allowing the defendant \$50 for suit money, and \$150 to cover the cost of the stenographer's transcription of his notes. From this order the plaintiff appealed.

Section .3677, Revised Codes, provides: "While an action for divorce is pending the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." Appellant concedes that under the provisions of this section the allowance of money to the defendant to carry on the litigation with the plaintiff was a matter within the sound legal discretion of the trial court or judge, but insists that before the order could properly be made,

It appears from the admissions in the pleadings and from the judgment pleaded that the cause was at issue in the United States court; that an issue of fact, necessitating the presence of a jury, was ready for trial; that, after the jury was impaneled, evidence was submitted by both parties—that is to say, the plaintiff produced evidence tending to establish the facts set forth in her complaint (it is so admitted in the pleadings), and evidence was offered on the part of the defendant. The presumption is that the plaintiff's evidence as to how the accident occurred was a truthful narration of the facts, and differed in no substantial respect from that which she must offer in the district court. It is significant that witnesses were sworn and testified, in rebuttal, showing that every opportunity was given and accepted to bring out all of the facts. Indeed, each party announced, as is customary under such circumstances, that it had no further evidence to offer. Thereupon the defendant moved for a directed verdict, and we will assume, for the benefit of the plaintiff, notwithstanding the fact that the cause was being tried in a federal tribunal, that the court did not consider the weight of the evidence, but that the ground of the motion was that, as a matter of law, the defendant was entitled to a verdict. Thereupon the court, "having under consideration all of the evidence introduced in said action and being fully informed in the premises," directed the jury to render a verdict for the defendant. It seems to us that the conclusion is inevitable, from the language employed, that the court, applying the law to the facts, decided that, upon those facts, the plaintiff had no cause of action against the defendant. We do not see how the matter could be made plainer or how it can be claimed, in view of the express declaration of the federal judge that he had the evidence under consideration in granting the motion, that the result was reached on account of some defect or omission in the pleadings. It is argued that, for aught that is shown by the record, the court may have determined that there was a fatal variance between the pleadings and proof, and have granted the motion for that

reason. There is not any suggestion to that effect in the judgment; and it is admitted in the replication that the same cause of action was relied upon as a ground of recovery, and that the facts alleged in the complaint were the same as those alleged in the state court. The individual defendant Rundblad was dismissed from the case before the jury was impaneled; so that it is not to be supposed that his having been joined as a party was the reason for directing a verdict; the only reasonable conclusion, judging from the state of the record, is that the cause went to trial against the corporation defendant solely on the ground that it was liable upon the principle expressed by the maxim "*respondeat superior*." Such is the gravamen of the complaint in this case, admitted to be the same in its statement of facts as the complaint in the former action. The identity of the servant who caused the car to be "jerked" is of no importance, so far as the liability of the railway company is concerned. But the most significant fact, as shown by the judgment pleaded, is that the federal court did not confine itself to a determination that the plaintiff's complaint should be dismissed, but went further, and adjudged that, in view of the facts, the defendant was entitled to a verdict against the plaintiff. It was an ancient principle of the common, as well as the Roman, law, that there should be a speedy and final determination of litigation.

We conclude, therefore, that the appellant's motion for judgment upon the pleadings should have been granted. The judgment appealed from and the order denying a new trial are therefore reversed, and the cause is remanded to the district court of Silver Bow county, with directions to enter a judgment in favor of the appellant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY. and MR. JUSTICE HOLLOWAY concur.

Rehearing denied, April 30, 1910.

So that, in the present case, if the trial court upon hearing the motion for a new trial should conclude that substantial error had been committed upon the trial of the case, it not only could, but it would be its duty to, grant a new trial. Whether or not there is any probability of such result being reached, we cannot have any means of knowing. The record of the trial is not before us; but from the fact that the judge who presided at the trial of the case on the merits also granted this order we must assume that he, who was familiar with all the proceedings, deemed that there are for presentation, on the motion for new trial, questions which are fairly debatable. While the evidence adduced upon the hearing of this motion tends to show that the underlying motive which prompts the defendant in prolonging the litigation is a desire to harass the plaintiff and to burden him with costs and expenses, we are not prepared to say that the proof is so far conclusive that she ought to be denied the means of presenting her motion for a new trial, so long as the trial court evidently deemed the motion not altogether without merit.

We agree with counsel for appellant that it was incumbent upon the moving party to show the necessity for the allowance. In 14 Cyc. 752, it is said: "The wife must show upon her application for temporary alimony that she has no means under her control sufficient to maintain herself pending the litigation. If she has sufficient means of her own to provide for her separate maintenance, no such alimony will be allowed." It is conceded, also, that the rules governing allowances for suit money and expenses of litigation are the same as those which apply to allowances made for temporary alimony.

The evidence offered on the hearing of this motion discloses that the cost of the transcription of the stenographer's notes of the proceedings will be approximately \$100. The order makes an allowance of \$150 for that purpose. It is scarcely necessary to say that a court is never warranted in allowing more than is necessary for the purpose to which it is to be applied; and we imagine that the amount of the order was a

mere clerical misprision, and should be corrected to correspond with the proof. If it should hereafter appear that \$100 is not sufficient to meet the particular purpose, the court can, and doubtless will, make a further order covering the deficiency; but, upon the record as it now stands, the cause should be remanded to the district court, with directions to modify the order, by decreasing the amount thereof, for transcribing the stenographer's notes, from \$150 to \$100, and as thus modified the order should be affirmed, and it is so ordered. Had the appellant called to the attention of the district court or judge the mistake in the order which we have just considered, doubtless it would have been corrected and the expense of this appeal avoided. As he did not do so, he will be taxed with the costs of the appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE HOBBS' ESTATE. ROE, RESPONDENT, v. TREMBLAY, APPELLANT.

(No. 2,738.)

(Submitted March 14, 1910. Decided March 26, 1910.)

[108 Pac. 7.]

Wills—Probate Proceedings—Contest Before Probate—Issues not Triable—Testamentary Capacity—Evidence—Insufficiency.

Probate of Wills—Improper Influence—Evidence—Insufficiency.

1. Where, on the contest of a will before probate, there was no evidence whatever that the making and execution of the instrument were not the free and voluntary acts of the deceased, a finding by the jury to that effect was unwarranted.

Same—Want of Testamentary Capacity—Insufficiency of Evidence.

2. Testimony that testator had, in a will executed one day prior to the one offered for probate, described himself as being of the same age as he was eight years before when he had made another will, and that in the one offered he had left one dollar to a brother, when in fact he had never had a brother, was not sufficient in weight to

overcome the positive and uncontradicted statements of witnesses, who were frequently present in the room of testator for forty-eight hours before his death and at the time of the execution of the will, and of others who had known him well for years, that, while he was in a weakened condition physically from the effects of disease, he was sound mentally and fully understood the contents of the will; hence the court erred in adopting a finding of the jury that deceased was not of sound and disposing mind when he made the will.

Same—Validity of Will—Who may Question.

3. The fact that testator in a prior instrument had left all of his property to a nephew did not deprive a sister of deceased of her right to contest the probate of a subsequent will, which revoked all former ones; under such conditions any heir at law was in a position to call the validity of the instrument in question.

Same—Issues—Jurisdiction.

4. In proceedings looking to the probate of a will, the district court is without jurisdiction to determine the validity or invalidity of specific bequests or devises; such issue must be tried and adjudicated in appropriate proceedings instituted after the will is formally admitted to probate.

Same.

5. *Held*, under the rule stated in paragraph 4, *supra*, that the district court erred in determining that in making the contestee the principal beneficiary under the will sought to be probated, testator did so with the understanding that she should take the property as trustee for a charitable organization, and in denying probate on the ground, among others, that the instrument was void under sections 4761 and 4762, Revised Codes, providing that a legacy or devise to any charitable institution, or to any person in trust for charitable uses, not made within thirty days before the death of testator, is invalid.

Appeal from District Court, Teton County; J. E. Erickson, Judge.

PROCEEDINGS by Mathilda Tremblay for the probate of the will of John Hobbs, deceased, in which Mary H. Roe appeared as a contestant. From a judgment denying the probate, contestee appeals. Reversed and remanded.

There was a brief in behalf of Appellant by *Mr. Thomas E. Brady*, and *Messrs. Veazey & Veazey*; oral argument by *Mr. I. Parker Veazey*.

The contestant is not an "interested party," within the meaning of the law, so as to permit her to contest this will. Section 7394, Revised Codes, provides, "that any person interested may appear and contest the will." The authorities are uniform in interpreting the terms "any person interested" as

meaning, that to be a qualified contestant of a will, the person must have a beneficiary interest in the estate greater in extent than that granted the contestant, by the will sought to be probated. (*In re Hickman's Estate*, *Bronner v. Jahant*, 101 Cal. 609, 36 Pac. 118; *In re Sandborn's Estate*, 98 Cal. 103, 32 Pac. 865; *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840; Page on Wills, sec. 325.) In order to show that contestant has a right to maintain this action, in addition to the allegations contained in said contest, she should have set forth that Hobbs left no other will, or if he did, she was a legatee in such will to a greater extent than in this one; but the proof shows that he did leave two other wills of earlier date than this one, and that in neither of them was she named as a legatee.

The finding that the testator was of unsound mind is repugnant and contradictory to the finding that he was unduly influenced, as undue influence must be such that it destroys the free agency of the testator. (*Delaplain v. Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788, 30 S. E. 201.) And undue influence must be such as subjects the mind of the testator to the will of the person operating upon him. (*Robinson v. Robinson*, 203 Pa. 400, 53 Atl. 253.) And a charge of undue influence admits mental capacity to make a will. (*Gwin v. Gwin*, 5 Idaho, 271, 48 Pac. 295; *Dexter v. Codman*, 148 Mass. 421, 19 N. E. 517.) Evidence that raises a mere suspicion of undue influence is not sufficient. (*In re McDevitt*, 95 Cal. 17, 30 Pac. 101.)

The district court was without jurisdiction in this proceeding to determine the validity or invalidity of specific bequests and devises. The only question involved, and the only matter adjudicated, in the probating of a will is as to whether the instrument offered for probate is a will in a strictly legal sense. If the instrument has been duly executed, published and witnessed as required by the local laws, and the testator is capable of making a will, the instrument is entitled to probate irrespective of all questions as to the effect, or even the validity, of

any one or more provisions in the instrument by which the testator attempts to dispose of his estate. Formerly, and in many jurisdictions still, the probate courts had no power to consider or determine the validity, construction or effect of devises or bequests, it being necessary to resort to a court of equity, for all such purposes, after the will, containing such devises or bequests, had been probated; and, while the district courts of this state now have both equity and probate jurisdiction, they cannot, while administering probate matters, exercise equity powers. (See *Chadwick v. Chadwick*, 6 Mont. 576, 13 Pac. 385; *State ex rel. Donovan v. District Court*, 27 Mont. 418, 71 Pac. 401; *Mulholland v. Gillian*, 25 R. I. 87, 54 Atl. 928, 1 Ann. Cas. 366; *Estate of Cobb*, 49 Cal. 604; *Estate of Sanderson*, 74 Cal. 208, 15 Pac. 753; *Bliss v. Macomb*, 129 Mich. 127, 88 N. W. 390; *Hawley v. Brown*, 1 Root (Conn.), 494; *Jolliffe v. Fanning*, 10 Rich. (S. C.) 186; *Wood v. Sawyer*, 61 N. C. 251; *In re McLaughlin's Will*, 1 Tuck. (N. Y.) 79; *In re Lennon's Estate*, 152 Cal. 327, 125 Am. St. Rep. 58, 92 Pac. 870, 14 Ann. Cas. 1024; *Kultz v. Jaeger*, 29 App. Div. (D. C.) 300.)

Mr. J. W. Freeman, *Mr. J. G. Bair*, and *Mr. W. F. O'Leary* submitted a brief in behalf of Respondent. *Mr. Freeman* argued the cause orally.

The respondent in this case is a sister of the testator, and the father and mother are dead; therefore, in case of intestacy, she would be an heir at law. Under section 4820, subdivision 3, Revised Codes, plaintiff was an heir at law of decedent and held such an interest in his estate as to entitle her to contest the will. Section 7407 provides: "Any person interested may at any time within one year after such probate appear and contest the same, or the validity of the will." The rule is generally "that all relatives who would be entitled to an interest in property should the testator die intestate are entitled to contest the probate of his will." (Ramsend on the Preparation and Contest of Wills, pp. 82, 373.) Plaintiff had a di-

rect, pecuniary interest in the estate, and next of kin, and was therefore entitled to appear and contest the will. (*Brewer v. Barrett*, 58 Md. 593; *Dower v. Church*, 21 W. Va. 23; *Morey v. Sohler*, 63 N. H. 512, 56 Am. Rep. 538, 3 Atl. 636.) "The probability of an interest, or even an interest dependent upon a condition, is enough." (*State v. District Court*, 25 Mont. 365, 65 Pac. 120.) But it is claimed that as this prior will deprived the contestant of any interest in the estate, by devising all to the nephew, she was not qualified to contest the probate of the will. This will had never been probated, and was therefore not a will, and could not be treated as such in this proceeding; it was not pleaded, and contestant bases her right to contest upon the ground that she is an heir, and not a devisee. (See *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650; *Dower v. Church*, 21 W. Va. 46; *Murphy's Exrs. v. Murphy*, 23 Ky. Law Rep. 1460, 65 S. W. 165.)

There was a secret trust created by the will in question, and the devisee being present and consenting to the same, and the purpose thereof having been known by her at the time the will, if executed, was executed in her presence, the bequest is illegal, as she could be compelled to execute the trust, if lawful. (*Edwards v. Pike*, 1 Eden, 267, 28 Eng. Reprint, 687; *Russell v. Jackson*, 10 Hare, 204, 68 Eng. Reprint, 900; *Fairchild v. Edson*, 154 N. Y. 199, 61 Am. St. Rep. 609, 48 N. E. 541; *Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465; see, also, cases cited in note under *Flood v. Ryan*, 22 L. R. A., n. s., page 1262, where the question is very exhaustively treated.)

Our Code (section 7397) prescribes four different issues which may be framed and submitted to a jury in a contest of a will offered for probate: (1) The competency of the testator; (2) freedom from duress, menace, fraud or undue influence; (3) the due execution of the will; and (4) any other question substantially affecting the validity of the will. The first three embrace the causes which are most usually involved, and which

are competent under the proceedings of all the states. The fourth issue is a question substantially affecting the validity of the will—the entire will—not simply some of its clauses. It was a question of fact as to the intention or scheme of the entire will, embracing not only the bequest to contestee, in trust for Columbus Hospital of Great Falls, but the appointment of said Mathilda Tremblay as executrix of such will in furtherance of such schemes; in other words, it not only involved the disposition of the entire estate for or to such charitable use, but also the appointment of the particular executrix in order that not only the estate, but also all the fees of such executrix, should go to such institution. A short review of the cases cited by appellant will reveal the fact that none of them are in point in this case. In the state of Michigan, the practice is to investigate just such questions as are herein presented upon the probate of a will. (See *Allison v. Smith*, 16 Mich. 405; *People ex rel. Frazer v. Wayne*, 39 Mich. 199.) It is provided by statutes or by the practice in Massachusetts, and some other states, that a will may be probated in part and disproved in part. (*Stearns v. Brown*, 1 Pick. 530; *In re Welsh*, 1 Redf. Sur. 238; *Guthrie v. Owen*, 21 Tenn. (2 Humph.) 202, 36 Am. Dec. 311.)

MR. JUSTICE SMITH delivered the opinion of the court.

On February 11, 1907, Mathilda Tremblay, also known as Sister Mary Julian, filed her petition in the district court of Teton county praying that the last will and testament of John Hobbs, deceased, dated February 5, 1907, be admitted to probate. The following is a copy of the alleged will:

“I, John Hobbs, of sound and disposing mind and memory, do hereby make, publish and declare this, my last will and testament, hereby revoking any and all former wills by me at any time heretofore made.

“First: I direct that all my just debts be paid, including funeral expenses, and all expense of last sickness.

“Second: I direct that my executrix herein named shall have a suitable monument erected at my grave, not to cost more than Five Hundred Dollars (\$500.00).

“Third: To my brother and sisters, nieces and nephews, I will and bequeath the sum of One Dollar (\$1.00) each.

“Fourth: The balance and residue of my estate, both real and personal, I will, devise and bequeath unto Mathilda Tremblay (Sister Mary Julian), to be by her used in such manner and benefits as she may see fit.

“Fifth: I hereby name, constitute and appoint as the executrix of this will, Mathilda Tremblay (Sister Mary Julian), and request that she be permitted to execute the duties of this trust without being required to give bond.

“Sixth: I hereby revoke any former wills or bequests by me at any time heretofore made.”

On March 2, 1907, Mary G. Roe filed her written contest, wherein she alleged that she is a sister of deceased; that he left no surviving issue, wife, father, or mother; that at the time of the execution of the will he was not of sound or disposing mind or capable of making a will; that the so-called will was executed “under influence of the importunities, suggestions or persuasions of said Mathilda Tremblay or of some other person or persons unknown, and is not the free and voluntary act of said John Hobbs”; that “said pretended will was unduly executed”; that it was understood and agreed between Hobbs and Mathilda Tremblay that the latter was to take the property for the use and benefit of the Sisters of Charity of Providence, a benevolent and charitable organization; that the pretended will was executed less than thirty days prior to the death of Hobbs, and the property was left to proponent for the purpose of avoiding, if possible, the force and effect of the provisions of sections 1758 and 1759 of the Code of Civil Procedure (now sections 4761, 4762, Revised Codes). The affirmative allegations of the so-called contest were put in issue by an answer. The cause was tried to the district court of Teton county, sitting with a jury, which returned the following special findings: (1) Was John

Hobbs, deceased, of sound and disposing mind at the time of making the will in question of February 5, 1907? Answer: No. (2) Did John Hobbs, deceased, make the will in question and therein name Mathilda Tremblay as principal beneficiary with the understanding and agreement between himself and herself that she would take the property of the deceased as trustee, and for the purpose of distributing same to the society or organization which conducts and operates what is known as the Columbus Hospital in the city of Great Falls, Mont.? Answer: Yes. (3) Was the will in question duly executed? Answer: No. (4) Was the will in question made as the free and voluntary act of John Hobbs, deceased? Answer: No." A judgment was entered rejecting the alleged will and refusing to admit the same to probate. From this judgment and an order denying a new trial, the proponent has appealed.

Before proceeding to an examination of the matters argued in this court, it may be well to dispose of finding No. 3, in which the jury determined that the will was not duly executed. They probably misunderstood the import of this question. It should have been decided by the court in the affirmative. The testimony shows beyond doubt that all necessary statutory formalities were complied with, if deceased was of sufficient mental capacity to execute a will.

Three questions are offered for our solution: (1) It is contended that contestant, Mary G. Roe, is without right to oppose the probate of the offered will on account of the fact that she has no interest in the estate; that prior to its execution deceased had on March 18, 1899, made another will, by which he left all of his property to his nephew, John Roe, which former will is still in force if not legally revoked by later wills. (2) It is most seriously argued by counsel that findings Nos. 1 and 4 are without substantial support in the testimony. (3) The last point is that the district court of Teton county sitting as a court of probate with limited jurisdiction had no authority in this proceeding to try the question whether the devise and bequest to the proponent are void by virtue of the statute above referred to.

Disposing, first, of the second question, we have carefully read and examined all of the evidence in the record, and conclude therefrom without hesitation that there is no substantial testimony to warrant the first and last findings. While it is true that in a will executed one day prior to the one offered for probate the testator described himself as being of the same age as he was at the time of executing the will of March 18, 1899, and that in the offered will he undertakes to leave one dollar to his "brother, sisters, nieces and nephews," when in fact he had never had a brother, we do not regard these matters as of sufficient weight or importance to overcome the positive testimony of those who were frequently present in the room of the deceased at different times for forty-eight hours immediately before his death and at the time of the execution of the will, and of other witnesses who had known him well for years. These witnesses testified categorically that, while he was in a weakened condition physically from the effects of the disease known as erysipelas, he was nevertheless capable and sound mentally, and fully understood the contents of the will and the disposition of his property thereby provided for. This testimony was uncontradicted, and we find nothing suspicious or improbable about it. There is no evidence whatever that the making and execution of the will were not free and voluntary acts of the deceased. No necessity exists for encumbering this opinion with a narrative or summary of the testimony on this point. It may be found in the record on file in the clerk's office. We conclude, therefore, that the court below was in error in adopting findings Nos. 1 and 4, and interrogatories 1 and 4 should have been answered in the affirmative.

2. The foregoing disposes incidentally of appellant's first contention, for the reason that the offered will revokes all former wills, and therefore any heir at law of deceased is in a position to raise the third question submitted for determination. The matter also becomes immaterial in view of the disposition hereafter to be made of the third contention.

3. Sections 4761 and 4762 of the Revised Codes read as follows:

“Sec. 4761. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or corporation or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid; *Provided*, that no such devises or bequests shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a *pro rata* deduction from such devises or bequests shall be made, so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law.

“Sec. 4762. No estate, real, or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses except the same be done by letters duly executed at least thirty days before the decease of the testator, and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid: *Provided*, that the prohibition contained in this section shall not apply to cases where not more than one-third of the estate of the testator shall be bequeathed or devised for charitable or benevolent purposes.”

Appropriate and timely objection was made by proponent to the consideration by the court of the legal effect of the fourth clause of the will, and it is now insisted that the court erred in submitting interrogatory numbered 2, relating thereto, to the jury. We are of opinion that this contention must be upheld. Section 7397, Revised Codes, provides that upon the contest of a will the following issues of fact may be tried:

“(1) The competency of the decedent to make a last will and testament.

“(2) The freedom of the decedent at the time of the execution of the will from duress, menace, fraud or undue influence.

“(3) The due execution and attestation of the will by the decedent or subscribing witnesses; or,

“(4) Any other questions substantially affecting the validity of the will, must, on request of either party in writing filed three days prior to the day set for hearing, be tried by a jury. If no jury is demanded, the court or judge must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.”

It will be observed that the statute refers in terms to issues of fact after a demurrer has been overruled. The fourth paragraph of the section is somewhat general in terms, but the questions therein referred to are those substantially affecting the validity of the will itself, and not any particular devise or bequest therein provided for. The fact that the bulk of the estate is given to the proponent can make no difference in principle. The will provides for the payment of debts and appoints an executrix, and is therefore complete without clause 4. (See *Mulholland v. Gillan*, 25 R. I. 87, 54 Atl. 928, 1 Ann. Cas. 366.) Article II, Chapter II, Revised Codes, in which section 7397 is found, is entitled: “Contesting Probate of Wills.” Section 7399, Revised Codes, provides that, upon return of the special verdict, “judgment of the court must be rendered either admitting the will to probate or rejecting it.” Section 7402, Revised Codes, provides that if the court or judge is satisfied upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will. Thus the will is admitted to probate. There is not any indication in the Article of the Code under consideration that the validity or invalidity of specific bequests or devises may be considered in this proceeding; and there is no authority in the court to do so, unless perchance a determination of such question would affect the validity of the entire will, which is not

the case here. The issue indicated may be tried and determined in appropriate proceedings instituted after the will is formally admitted to probate. This court in *State ex rel. Donovan v. District Court*, 25 Mont. 355, 65 Pac. 120, said: "But the contest of a will does not involve the question whether the property has escheated or will escheat, nor the question whether the property or its proceeds should be deposited in the state treasury for the benefit of nonresident alien heirs. Neither question can be adjudicated upon the contest of a will or of its probate. The office of a contest is to attack the validity of a purported will. Its object is to have such will rejected. Consideration of the question of title, except in so far as it may be essential to ascertain whether the contestant is an interested person, within the meaning of sections 2329 and 2340 of the Code of Civil Procedure [of 1895], would be without the legitimate scope of the proceeding."

In *Barney v. Hayes*, 11 Mont. 99, 27 Pac. 384, Mr. Chief Justice Blake, speaking for this court, said: "It would be improper for us to express an opinion upon the interpretation of said will until the issues of fact have been tried and determined according to law." The supreme court of California, in *Re Sanderson*, 74 Cal. 199, 15 Pac. 753, said: "In cases of contests of a will the issues must be such as that the determination of them will leave to the court no office except to enter a judgment admitting the will to probate or rejecting it." In *Estate of Mary Cobb*, 49 Cal. 599, it was said: "The other questions attempted to be raised by the objections filed concern the construction to be placed upon the will, and cannot be considered until it shall have been admitted to probate." In the case of *Wood v. Sawyer*, 61 N. C. 251, it was held that when a paper, purporting to be a will, and executed with the requisite formalities by a person competent to make a will, is offered for probate, it must be established without regard to the construction of its contents, and without consideration of trusts declared therein. In the *Matter of the Will of McLaughlin*, 1 Tuck. (N. Y.) 79, the surrogate said: "It is the *factum* of the document that is

then [at the time of application for probate] under consideration." The supreme court of California in the *Matter of the Estate of Pforr, Deceased*, 144 Cal. 121, 77 Pac. 825, held that a will regular in form and properly executed cannot be denied probate on the ground that some of its provisions are invalid. (See, also, *Bliss v. Macomb, Probate Judge*, 129 Mich. 127, 88 N. W. 390.)

We conclude that the court erred in refusing to admit the will to probate. The judgment is therefore vacated and set aside, and the order denying a new trial is reversed. The cause is remanded, with directions to admit the will to probate.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

MILEY, RESPONDENT, v. NORTHERN PACIFIC RAILWAY CO., APPELLANT.

(No. 2,783.)

(Submitted March 15, 1910. Decided March 26, 1910.)

[108 Pac. 5.]

Railroads—Passenger and Carrier—Failure to Stop Train at Station—Statutory Penalty—Pleading and Proof.

Supreme Court—Dismissal of Action—Jurisdiction.

1. The supreme court is without jurisdiction to dismiss an action brought before it on appeal; its power to dismiss actions or proceedings is confined to those commenced in the appellate court.

Special Statutes Creating New Liability—Pleading and Proof.

2. To enable a person to recover under a statute creating a liability where none existed before, he must not only plead facts bringing his cause of action within its purview, but prove them as alleged.

Railroads—Carriage—Special Contracts—Power to Make.

3. In the absence of statutory prohibition, a railway company may sell, for a reduced fare, a particular form of ticket, whereby its liability is restricted and its obligations curtailed.

Same—Transportation—Statutory Provision.

4. *Quære*: Is a railway company required, under section 4330, Revised Codes, upon tender of the regular fare, to furnish a ticket to

a person desiring passage to a certain station on its line, good upon all its passenger trains running past such point?

Same—Transportation—Failure to Stop at Station—Statutory Penalty—When not Recoverable.

5. Section 4330, Revised Codes, provides that every railway company must, upon tender of the regular fare, furnish a ticket entitling the purchaser to ride to any other station on its line, etc. Plaintiff bought an excursion ticket at a reduced rate to a certain station on defendant's line and boarded a train which did not stop at the point to which her ticket called for transportation. She brought suit to recover, and recovered, the penalty of \$200 provided for in the section above. *Held*, that plaintiff, having failed to pay the regular fare for her ticket, was not one of the class of persons for whose benefit the statute was enacted, and therefore could not maintain an action for the penalty provided in it.

Appeal from District Court, Park County; Frank Henry, Judge.

ACTION by Alta Miley against the Northern Pacific Railway Company. From a judgment for plaintiff and from an order denying it a new trial, defendant appeals. Reversed and remanded.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines submitted a brief in behalf of Appellant. *Mr. Wallace* argued the cause orally.

No appearance for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

During the month of July, 1908, the Northern Pacific Railway Company was operating a double train service over its Park branch, between Livingston and Gardiner. On that line of road, and between the regular stations at Emigrant and Electric, there is a flag station known as "Daileys." At the time in question passenger train No. 103, which left Livingston in the forenoon, did not stop at Daileys, but passenger train No. 101, which left Livingston in the afternoon, did stop at that point to let off or take on passengers. On July 4, 1908, the plaintiff purchased from the Northern Pacific ticket agent at Livingston a round-trip ticket for passage to Daileys and

return, and boarded train No. 103 for the purpose of making her journey. When the train conductor came to collect her ticket, he informed her that the train she was then on did not stop at Daileys, and she was thereupon forced to alight at Emigrant, which was the nearest station to Daileys at which the train did stop. She brought this action, and in her complaint assumes to state two causes of action: the first founded upon the defendant's common-law liability, and the second upon the provisions of section 4330 of the Revised Codes of Montana. The first cause of action seems to have been abandoned at the trial; at least the instructions given by the court only submitted to the jury the second cause of action, and upon that cause of action a verdict was returned in favor of the plaintiff for the statutory penalty of \$200; and from the judgment entered on the verdict, and from an order denying it a new trial, the railway company appealed.

The respondent did not make any appearance in this court, but apparently confessed error by asking this court to dismiss the action. This motion we cannot grant. It is only an action or proceeding commenced in this court that we have any authority to dismiss under any circumstances. To dismiss the appeals would amount to an affirmance of the judgment and order, and, as there are not any grounds urged for such action, we are left to consider on the merits the questions raised, or such of them as may be necessary to a determination of the appeals.

The evidence offered by the plaintiff discloses that the ticket she purchased was an excursion ticket, issued on account of the Fourth of July holiday, and that it was sold to her for \$1.20, whereas the regular round-trip fare from Livingston to Daileys was \$1.80. Section 4330, Revised Codes, under which this recovery was had, reads as follows: "Every railroad corporation must provide, and on being tendered the regular rates of fare, furnish to every person desiring a passage on their passenger-cars, a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or sta-

tion where the same is purchased, to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars."

We do not deem it advisable to determine some of the important questions suggested by appellant's brief. This cause has not been argued for respondent, and we reserve our decision upon those questions until such time as they may arise and be fully presented. Section 4330 creates a liability, on the part of the railway company, where none existed before, and since this action was tried upon the theory of the company's liability under the statute, and not otherwise, the only question with which we need concern ourselves at this time is: Does the plaintiff make out a case entitling her to the penalty provided in that section? In *Kelly v. Northern Pacific Ry. Co.*, 35 Mont. 243, 88 Pac. 1009, this court said: "In order to settle the rule in this state, we decide that, where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute." Of course, it follows that the proof must then conform to the facts pleaded.

It will be observed that section 4330 does not absolutely require the railway company to furnish a ticket good from Livingston to Daileys upon every train running upon the Park branch; at the utmost it can only be said that it makes such requirement provided the regular fare is tendered; and, as to whether the section goes to this extent, we reserve our decision. The plaintiff did not tender or pay the regular fare. She purchased an excursion ticket for which she paid a special or reduced fare; and that, in the absence of statutory restrictions,

a railway company may for a reduced fare sell a particular form of ticket, whereby its liability is restricted and its obligations curtailed, is recognized by the authorities generally. (*Rose v. Northern Pacific Ry. Co.*, 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 767.)

Since the plaintiff insists that she is entitled to recover the penalty provided by section 4330 above, by reason of the fact that she was not permitted, by virtue of the ticket she had purchased, to ride from Livingston to Daileys and to alight at that station from the train upon which she sought carriage, she must show that she met the requirements of that section, which have to do with the passenger as distinguished from the carrier; and, as we have just observed, the first requirement is that she should have tendered the regular fare for her ticket, and this she did not do. Our Constitution (section 7, Article XV), our Codes, this court, in *Rose v. Northern Pacific Ry. Co.*, above, and *Brian v. Oregon Short Line R. Co.*, 40 Mont. 109, 105 Pac. 489, and the authorities generally, recognize the distinction between a ticket sold at the regular fare, and one sold at a reduced fare or special price. The plaintiff sought to make her journey upon train No. 103, and the trouble arose because that train would not stop at Daileys to let her off. There is evidence that she was misled by the ticket agent; but that evidence has to do only with the first cause of action, which did not go to the jury. It could not have any application to the cause of action for the statutory penalty. Whatever right section 4330 may confer upon a passenger who has paid or tendered the regular fare for his ticket, it does not assume to confer any whatever upon a person who has purchased a ticket at a price below the regular fare, as plaintiff in this instance did; and since the plaintiff does not bring herself within the class of persons for whose benefit section 4330 was enacted, she cannot maintain an action for the penalty which that section provides.

The judgment and order are reversed, and the cause is remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

ARCHER ET AL., APPELLANTS, v. CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY CO., RESPONDENT.

(No. 2,802.)

(Submitted March 18, 1910. Decided April 2, 1910.)

[108 Pac. 571.]

*Real Property—Easements—Parol Licenses—Revocation—Acts
Constituting—Appeal.*

Real Property—Easements—Parol Licenses—Revocability.

1. A parol license (not coupled with an interest and for which not any consideration had been paid), to erect a dam on, and construct an irrigation ditch over, the licensor's land, is revocable at the latter's will at any time, even though acted upon and the licensees expended money in reliance thereon.

Same—Revocation—Acts Constituting.

2. An appropriation of premises to a use inconsistent with the enjoyment of a parol license constitutes a revocation of it.

Same—Revocation—Notice.

3. Notice of the revocation of a parol license is only necessary where the licensors have removable property upon the premises.

Same—Revocation—Acts Constituting.

4. A parol license to erect a dam and construct an irrigation ditch on and over the licensor's lands was revoked by his action in granting a right of way to a railroad company for a grade embankment, the natural consequence of the maintenance of which was to injure the dam and ditch at high-water season; hence any damage in this respect constituted *damnum absque injuria*.

Evidence—Admissibility—Pleading—Review.

5. Where evidence was admitted without objection, the question whether its introduction was warranted by the pleadings will not be considered on appeal.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by T. F. Archer and others against the Chicago, Milwaukee & St. Paul Railway Company of Montana. From an order granting defendant a new trial, plaintiffs appeal. Affirmed.

In behalf of Appellants, *Mr. Wm. Wallace, Jr.*, and *Mr. W. M. Johnston* submitted a brief. *Mr. Wallace* argued the cause orally.

When plaintiffs built their dam and their ditch on Bachman's land, they were state agents in charge of a public use, and had the right to acquire a fee for their dam site, and an irrevocable easement for their ditch right of way, by condemnation, had Bachman been unwilling to bestow it upon them. (*Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757; *Smith v. Deniff*, 24 Mont. 22, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741.) Under the circumstances of this case, Bachman, the owner of the land, lost his right to maintain either trespass or ejectment against plaintiffs. There remained in him merely a right to claim damages, for the taking of the right of way and damsite; this right was personal to Bachman, would not have passed to his grantee had he deeded away the entire property, and was subject to be barred by the limitation applicable to such an action. (*Roberts v. Northern Pacific*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873; *Penn Mut. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *Northern Pacific v. Smith*, 171 U. S. 275, 18 Sup. Ct. 794, 43 L. Ed. 157; *New York City v. Pine*, 185 U. S. 105, 22 Sup. Ct. 592, 46 L. Ed. 820; *United States v. Lynah*, 188 U. S. 467, 23 Sup. Ct. 349, 47 L. Ed. 547; *Maffet v. Quine*, 93 Fed. 349; *King v. Railway*, 119 Fed. 1017; *Miocene Ditch Co. v. Jacobson*, 146 Fed. 686, 77 C. C. A. 106; *Warren etc. R. Co. v. Garrison*, 74 Ark. 136, 85 S. W. 82; *Atlanta etc. Ry. v. Barker*, 105 Ga. 534, 31 S. E. 455; *Green v. Railway*, 112 Ga. 849, 38 S. E. 81; *Railway v. Englehart*, 57 Neb. 444, 77 N. W. 1094; *Kakeldy v. Railway*, 37 Wash. 675, 80 Pac. 207.)

In many of the states, even though the parties occupying the land are engaged in a purely private enterprise for which no interest in the land could be gained against the owner's will, it is held that if the owner suffers, or especially if he permits them to enter, and to expend large sums of money making valuable improvements, well knowing their purpose, he estops himself from exercising the right of revocation, on the ground that to exercise it would be a fraud on the licensees. (25 Cyc. 646; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; .

Hazleton v. Putman, 3. Pinn. 107, 3 Chand. 117, 54 Am. Dec. 158, and cases cited; *De Graffenreid v. Savage*, 9 Colo. App. 131, 47 Pac. 902; *Hiers v. Mill Haven Co.*, 113 Ga. 1002, 39 S. E. 444; *Saucer v. Keller*, 129 Ind. 475, 28 N. E. 1117; *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Kastner v. Benz*, 67 Kan. 486, 73 Pac. 67; *Lee v. McLeod*, 12 Nev. 280; *State v. Mayor*, 49 N. J. L. 303, 60 Am. St. Rep. 619, 8 Atl. 123; *Garrett v. Bishop*, 27 Or. 349, 41 Pac. 10; *Dark v. Johnston*, 55 Pa. 164, 93 Am. Dec. 732; *Risien v. Brown*, 73 Tex. 135, 10 S. W. 661; *Western Union Tel. Co. v. Bullard*, 67 Vt. 272, 31 Atl. 286; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407; *National Waterworks Co. v. Kansas City*, 65 Fed. 691; *Grimshaw v. Belcher*, 88 Cal. 217, 22 Am. St. Rep. 298, 26 Pac. 84; *Brantley v. Perry*, 120 Ga. 760, 48 S. E. 332; *Sumpter Ry. Co. v. Gardner*, 49 Or. 412, 90 Pac. 499; *Dawson v. Railroad Co.*, 107 Md. 70, 126 Am. St. Rep. 337, 68 Atl. 301, 15 Ann. Cas. 578, 14 L. R. A., n. s., 809.) Much more ought estoppel to arise in favor of this public use which plaintiffs in this case were actually in charge of.

What is the nature of the irrevocable right against Bachman thus created, and who had control of a damage claim arising from injury thereto? Conceding the plaintiffs had a ditch right of way across the land of Bachman, it could only be terminated by act of the plaintiffs themselves. Of course, Bachman, in 1899 when he gave plaintiffs permission to take materials as needed for construction of the ditch and dam, might have legally imposed as a condition thereof that he should be privileged to terminate their occupancy at any time on notice, or even that he should be permitted to adjust, or even forgive, if he so desired, any claim for damage that might arise in their favor through the construction of any railway. (*Stephens v. Southern Pac. Ry.*, 109 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783, 29 L. R. A. 751; *Hartford Ins. Co. v. Chicago etc. Ry. Co.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.) But he neither did in fact, nor did he attempt to, impose any

such conditions, and the right to claim damage for an interference with the ditch and dam never vested in Bachman, nor did the plaintiffs ever bestow it upon him. Section 4517 of the Revised Codes provides: "A servitude is extinguished, * * * 3. By the performance of any act upon either tenement by the owner of the servitude or with his assent which is incompatible with its nature or exercise." If a license made irrevocable by estoppel is analogous to a "servitude," it can only be extinguished by the act of the plaintiffs themselves. It goes without saying that Bachman could not grant to defendant any greater right than he himself possessed; and, if he could not himself have removed plaintiffs or recovered against them the ground occupied by their ditch and dam, he could not authorize defendant to do so.

It is insisted that the deed of the mere right of way was in legal effect a revocation by Bachman of plaintiff's rights to occupy and use the dam and ditch. Before this can be true, Bachman's purpose to revoke must be spelled from the deed. He did not expressly declare such purpose in the deed. As in the case of an easement, it can only be terminated by act of the easement holder necessarily incompatible with a purpose to further enjoy (Revised Codes, sec. 4517); so, in the case of a revocable license it can only be terminated by act of the person having a right to revoke necessarily incompatible with the enjoyment of the license. No power of revocation was conferred on the railway by Bachman, and if the declarations in the deed were not necessarily incompatible with the enjoyment of plaintiffs' privilege, then Bachman has never revoked or attempted to revoke plaintiffs' rights. While it is true that the law gave defendant the right to change either the high-water channel or the main channel of the river, they could only exercise this right on compensation to everyone suffering damage thereby, and the possession and occupancy of plaintiffs would be equally entitled to compensation for damage, if any sustained, as the occupancy and title of Bachman. The latter

Bachman forgave, the former he could not forgive. Even though the occupancy were under a revocable license solely, he could only terminate that occupancy; until he did so terminate it, the occupants would be entitled to claim damage, if any, resulting from the cutting off of the high-water channel.

In behalf of Respondent, there was a brief by *Messrs. Gunn & Rasch*, and oral argument by *Mr. M. S. Gunn*.

The doctrine that the appellants' license became irrevocable, and that the respondent and its grantor are estopped to claim otherwise, is repudiated and rejected by the weight of authority. In this state, the question is no longer open to discussion; and that a license is revocable, notwithstanding cost and expense may have been incurred, and expenditures made, upon the faith of such license, is settled law. (See *Great Falls Water Co. v. Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963; 3 Farnham on Water Rights, secs. 784-835; *Hicks Brothers v. Swift Creek Mill Co.*, 133 Ala. 411, 91 Am. St. Rep. 38, 31 South. 947, 57 L. R. A. 720; *Yaeger v. Tuning*, 79 Ohio St. 121, 128 Am. St. Rep. 679, 86 N. E. 657, 19 L. R. A., n. s., 700; *Rodefer v. Pittsburgh O. V. & C. R. Co.*, 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844; *Wilson v. St. Paul M. & M. R. Co.*, 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378; *Jones v. Stover*, 131 Iowa, 119, 108 N. W. 112, 6 L. R. A., n. s., 154; *Shipley v. Fink*, 102 Md. 219, 62 Atl. 360, 2 L. R. A., n. s., 1002; *Village of Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Ewing v. Rhea*, 37 Or. 583, 82 Am. St. Rep. 783, 62 Pac. 790, 52 L. R. A. 140; *Yaeger v. Woodruff*, 17 Utah, 361, 53 Pac. 1045; *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497; *Clapp v. City of Boston*, 133 Mass. 367.)

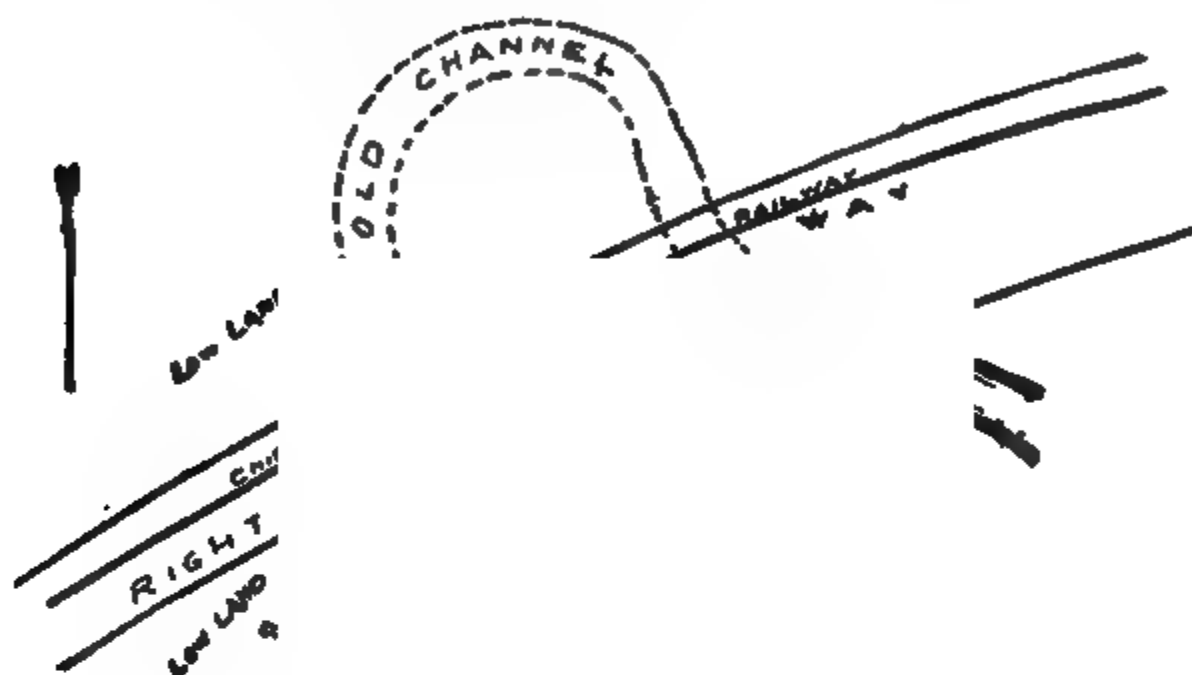
But it is insisted that the principle of these cases is not applicable here, because the appellants, and their predecessors in interest, could have acquired the right for the construction and maintenance of their dam and ditch upon the lands of

Bachman by proceedings in eminent domain. But upon this question the appellants are likewise concluded by the decisions of this court. (*Great Falls Water Co. v. Great Northern Ry. Co.*, *supra*; *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081; see, also, *Baltimore & H. R. Co. v. Algire*, 63 Md. 319; *Wood v. Michigan Air-Line Ry. Co.*, 90 Mich. 334, 51 N. W. 263; *Minneapolis etc. Ry. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319; *Johanson v. Atlantic City Ry. Co.*, 73 N. J. L. 767, 64 Atl. 1061, *Slaght v. Northern Pac. Ry. Co.*, 39 Wash. 576, 81 Pac. 1063; *Weidensteiner v. Mally* (Wash.), 104 Pac. 143; *Richmond & D. R. Co. v. Durham & N. R. Co.*, 104 N. C. 658, 10 S. E. 659; *St. L. N. Stockyards v. Wiggins Ferry Co.*, 112 Ill. 384, 54 Am. Rep. 243; *Murdack v. Prospect Park R. Co.*, 73 N. Y. 579; *Minneapolis, St. P. & Ste. M. Ry. Co. v. Marble*, 112 Mich. 4, 70 N. W. 319; *Baltimore & H. R. Co. v. Algire*, 63 Md. 319.)

It is contended that there was no revocation of the license to maintain the dam and ditch upon Bachman's land, and that before it can be said that the rights of the appellants under the license have been abrogated, "Bachman's purpose to revoke must be spelled from the deed." The deed conferred upon the respondent, in terms as positive and clear as language can make it, the right and authority to construct its road in such manner as it should choose, subject only to the provisions for openings and passageways specifically enumerated in the deed. The manner in which the land was made use of for railroad purposes, being inconsistent with the use made of the premises by the appellants under their license, not only spelled a revocation of their license, but, as said by this court in *Prentice v. McKay*, *supra*, it "amounted to a revocation." (*Clapp v. City of Boston*, 133 Mass. 367; *Forbes v. Balenseifer*, 74 Ill. 185; *Wilson v. St. Paul M. & M. R. Co.*, *supra*; *Simpson v. Wright*, 21 Ill. App. 67; *Weidensteiner v. Mally*, *supra*.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The map herewith presented will serve to illustrate the facts appearing on this appeal.



In 1899 Kreichbaum, Cartwright, Gile, and Bethke constructed the dam across the Musselshell river at the point shown on the map, and likewise constructed a ditch tapping the east bank of the river immediately above the dam, for the purpose of conveying water for irrigating their lands lying farther down the river. Kreichbaum succeeded to the interest of Gile, Davis to the interest of Bethke, and Davis, Archer, and Cooley, each also acquired certain interests from Kreichbaum. From 1899 to the present time the dam and ditch have been used continuously by the plaintiffs during every irrigation season, except as hereinafter mentioned. For convenience the dam and ditch are marked on the map "Archer Dam and Ditch." The dam, the head of the ditch, the point where the line of railway crosses the original channel, at the initial letter "M," and all the territory at and to the left of these points and below the

north line of the right of way, is on the southeast quarter of section 27, township 9 north, range 28 east, part in Fergus county and part in Yellowstone county. At the time the dam and ditch were constructed, that land was, and continuously since has been, owned and possessed by George Bachman, except such of it as was conveyed to the defendant railway company. In 1906, when the Chicago, Milwaukee and St. Paul Railway Company came to construct its line of road through this state, it purchased by deed from Bachman a strip of land for right of way purposes, 100 feet in width, and, at the point illustrated by the map, an additional strip 200 feet wide, for the purpose of changing the channel of the Musselshell river. The deed from Bachman and wife to the railway company, in addition to conveying these strips of land, particularly authorizes the company to change the channel of the river at this point, and releases it from any and all claims for damages on account of such change. The deed requires the company to make some practical arrangement for taking water for irrigation purposes across the right of way, requires the company to make one grade crossing, and, if it could be done in a practical manner, to make an underground passageway for stock at a slough. The location of this slough is not fixed either in the deed or by the evidence. Upon one of the maps used upon the trial the location of a slough is indicated some distance west of the points mentioned above, and doubtless this is the slough to which reference is made in the deed. After making certain provisions for the use of snow fences by the railway company, the deed continues: "And said parties of the first part [Bachman and wife], for themselves and for their heirs and assigns, covenant and agree that said grant is upon no other consideration than that named herein; that neither said party of the second part [railway company] nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege over, across or under said railway; and that the right thereto shall be only that conferred by statute, or by an instrument in writing under the

corporate seal of the party of the second part. And said party of the first part hereby releases all damages and claims thereto to all its other lands by reason of the location, construction and operation of a railway over and upon said premises, hereby conveyed." Having secured this conveyance, the railway company excavated a new channel for the Musselshell river, as indicated on the map, and then constructed a solid grade embankment, about seven feet high, across the old channel at the point "M," and across the low land immediately adjacent thereto. The company also constructed an irrigation ditch, marked on the map "Railroad Ditch," tapping the west bank of the river some distance above plaintiffs' dam, and thence running in a northerly direction, substantially parallel with, and but a short distance from, the west bank of the river, to the railway grade and passing through the grade by means of a box flume. Prior to June, 1908, the location of the west bank of the river is represented on the map by the dotted line between points "A" and "B." Parallel with, and a short distance from, the west bank of the river as it was before the channel was changed, was a considerable area of land lower than the bank of the river itself, indicated on the map as "Low Land." During the period of high water, which occurred every spring, the water which overflowed the west bank of the river would flow over this low land and return to the main channel some distance below. After the railway company constructed its grade across the low land and across the old channel, the water was confined between this solid embankment and the bluff on the east and south sides of the new channel. During the high-water season in the early part of June, 1908, the west bank of the river at the dam and above and below it for some distance was overflowed, the embankment between the west bank and the railroad ditch completely cut out down to the level of the river-bed, the west bank of the river given the new position indicated on the map, and the plaintiffs' dam left as an obstruction to little more than one-half of this new channel, and wholly useless as a means of raising the water in the river so that it would flow through

the Archer ditch. In order to repair the damage, it was necessary for plaintiffs to extend the dam westward to the new bank a distance of about ninety feet (the new portion of the dam is indicated on the map as the "Extension"), and this was done at a necessary expense of \$1,727.23. Plaintiffs thereupon brought this action against the railway company to recover that amount. There is also a second cause of action set forth in the complaint for damages caused to the Archer ditch some distance below the dam; but from the fact that the amount of the verdict is exactly the amount claimed in the first cause of action, it seems reasonably certain that the jury disregarded the second cause of action altogether. The briefs of counsel deal with the first cause of action; and hereafter, in speaking of the pleadings, it will be understood that reference is made to the issues arising upon the first cause of action only.

The wrongful acts of the railway company which are said to have caused the injury to plaintiffs' dam are (a) constructing the solid grade embankment over and across the old channel and the low land, thereby preventing the flood waters from spreading over the low lands as they had theretofore done; and (b) constructing the railroad ditch so close to the west bank of the river, and failing to place in the ditch, at the point where it taps the river, a headgate to control the amount of water diverted by the ditch. It is said that because of these alleged wrongful acts the west bank of the river was washed away from the west end of the dam, resulting in the injury to plaintiffs, for which compensation is demanded. The cause, being at issue, was tried to the court sitting with a jury. At the conclusion of the evidence, counsel for defendant railway company moved the court for a directed verdict for defendant, upon the ground that the dam and head of the Archer ditch were shown to have been constructed and maintained by the plaintiffs upon the land of Bachman under a mere parol license, which had been revoked by the deed from Bachman and wife to the railway company. This motion was denied, the cause submitted to the jury, and a verdict returned in favor of the

plaintiffs for the amount claimed in the first cause of action. The defendant moved for a new trial, and this motion was granted in an order in which the court gives the reason for its ruling. The reason is the same as that specified as the ground of defendant's motion for a directed verdict. From the order granting a new trial the plaintiffs appealed. Two questions are presented for solution: (1) Did the right of plaintiffs to the use of Bachman's land for their dam and the head of their ditch rest merely in parol license, revocable at the will of Bachman; and (2), if the right amounted only to such license, was it revoked by the deed from Bachman and wife to the railway company?

1. When the Archer dam and ditch were constructed on Bachman's land, there was not any agreement made between the parties. Bachman's consent was not asked; but he knew of plaintiffs' operations, made no objections, and gave them permission to take from his adjacent land brush, rock and earth for the construction of the dam. Under these circumstances, it is urged by appellants that Bachman lost his right to maintain against the plaintiffs either trespass or ejectment, and that his only right, if any, was a right to maintain an action for damages. If the only claim which Bachman could assert against the plaintiffs was one for damages, then we agree with counsel for plaintiffs that such right was personal to Bachman, and did not pass to his grantee, the railway company, by virtue of the deed. But the extent of Bachman's right depends upon the character of plaintiffs' interest at the dam and head of the ditch. It cannot be questioned that at its inception the right of plaintiffs was merely a license resting in parol, a license not coupled with an interest, and for which there was not any consideration whatever paid. There are two classes of cases sustaining appellants' contention. The first proceeds upon the theory that when the licensee expends large sums of money in making the improvement, and such expenditure is made without opposition by the licensor, the license becomes executed and irrevocable; that, in fact, what was in its inception a license

becomes in reality a grant. Typical of this class of cases is *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497, decided in 1826. The other class proceeds upon the theory of estoppel *in pais*; that, by standing by without making objection and permitting the improvement to be made and large sums of money to be expended, the land owner is estopped to maintain ejectment or to have an injunction. A leading case of this character is *Goodin v. Cincinnati & White Water C. Co.*, 18 Ohio St. 169, 98 Am. Dec. 95, decided in 1868. By the second class it is held that the land owner's only remedy is an action for damages for the injury to his property. The doctrine of the Pennsylvania court has been adopted in some other states. In *Roberts v. Northern Pacific R. Co.*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873, decided in 1895, the doctrine announced by the second class of cases is asserted, though the decision of the Ohio court is not mentioned. The *Roberts Case* has been followed in *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, and in *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, and by some state and other courts. That the doctrine of each of these classes of cases was well recognized long prior to 1898 is sufficiently evidenced by the many decisions upon the subject extant at that time. In *Great Falls Waterworks Co. v. Great Northern Ry. Co. et al.*, 21 Mont. 487, 54 Pac. 963, decided in 1898, the same contentions were made that are now urged upon our attention. Particular emphasis is laid by appellants upon the fact that, while the *Roberts Case* above was decided more than three years prior to the *Great Falls Case*, it was not called to the attention of this court, and we are now asked to reconsider the questions decided. But while it is true that the case of *Roberts v. Railroad Co.* was not considered by this court, the principle of that case received very thorough attention, and the Pennsylvania and Ohio cases above, and many others supporting the doctrine announced in each of them, were relied upon by the waterworks company, and considered by this court. It was then recognized that the authorities are in conflict upon the subject,

but after a painstaking review, this court announced its conclusion as follows: "Now, the sequence of the rule that an easement can only be created by deed is that a license which merely renders lawful an entry which otherwise would be unlawful cannot, except by prescription—which is equivalent to a deed—become an absolute right in property without practically doing away with the statute of frauds, and completely overturning the common-law rule, as pointed out by Baron Alderson in *Wood v. Leadbitter*, 13 Mees. & W. 838, 16 Eng. Ruling Cas. 49. (Browne's Statute of Frauds, sec. 29.) An extended examination of cases bearing upon the doctrine of the revocability of parol licenses has impressed upon us the belief that the sound, the logical, as well as the safe, reasoning, sustains the rule that a parol license of the character of the one under consideration is always revocable at the pleasure of the licensor, so far as any further enjoyment of the privilege extended goes. (Freeman's note to *Lawrence v. Springer*, 31 Am. St. Rep. 715.) Modern text-writers, deducing principles from the more recent opinions of the courts, have taken this view of the subject; and to give that security to titles so essentially important in affording protection against flaws, and burdens not imposed by writing, but resting upon verbal permissions or agreements, it is well settled that the doctrine of estoppel is inapplicable, 'inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted at his own risk and peril.' "

The principle of the *Great Falls Case* was again asserted by this court in *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081; and now, after further consideration, we are thoroughly convinced of the correctness of this court's decision in each of the two cases cited above.

As a further ground of argument in favor of invoking against Bachman the doctrine of estoppel *in pais*, it is urged by appellants that, under the Constitution and laws of this state, they could have acquired their dam site and the right of way for their ditch by condemnation proceedings; but that question was likewise considered in the *Great Falls Case*. We are unable to

see wherein the fact adds anything to the character of plaintiffs' right. They were upon Bachman's land under a mere parol license or they owned a servitude upon his land. As was observed in the beginning, at its initiation plaintiffs' right rested merely in a parol license, and under the authority of this court, in the cases cited above, that right was not augmented by anything done by the parties thereafter, so far as this record discloses. The authorities supporting the decision in the *Great Falls Case* are collected at length in 25 Cyc. 648.

2. Having reached the conclusion that the right of plaintiffs upon Bachman's land rested in a mere parol license, revocable at the will of the licensor, we are brought to a consideration of the second question, viz.: Was that license revoked by Bachman? "A license may be revoked by obstructing the land licensed to be used, but an appropriation of the land to any use inconsistent with the enjoyment of the license works a revocation." (25 Cyc. 651; *Prentice v. McKay*, above.) And again: "Where the licensee has movable property on the premises, he should be given reasonable notice of a revocation of the license and an opportunity to remove it. But, where the termination of the license necessitates no removal of property, no notice is necessary." (25 Cyc. 652.) These plaintiffs did not have any removable property upon Bachman's land, and notice of revocation was therefore not necessary. Under the grant in the deed from Bachman and wife to the railway company, the company was authorized (a) to change the channel of Musselshell river; (b) to construct its grade embankment along the right of way over the old river channel and across the low land adjacent; and (c) to construct the railroad ditch. There was not any limitation imposed as to the manner of the use of the lands granted, except that the railway company was to provide some practical method for conveying water for irrigation purposes across its right of way, and, in the absence of any evidence to the contrary, we must assume that the railroad ditch with its box flume fully met that requirement to the satisfaction of Bachman, for whose benefit it was imposed. The right

of the company to construct the ditch in the manner in which it was constructed cannot be questioned. It was excavated upon Bachman's land, with Bachman's consent, and of itself the ditch did not interfere in any manner with whatever right the plaintiffs had. Furthermore, the provision of the deed for the construction of this ditch leaves it discretionary with the railway company to construct it in any manner, at least in any manner satisfactory to Bachman, and, so far as this record goes, the ditch as constructed appears to have met Bachman's approval. The deed also required the company to make a grade crossing; but that would not affect this case in any particular, and the evidence does not disclose whether it was or was not made. There is also the requirement that the company should construct an underground passageway for livestock at the slough, if it could be done in a practical manner, but we are not informed by this record whether that requirement was or was not fulfilled; in fact, the location of the slough is not identified. Neither is there anything to indicate that, if such passageway was not constructed, it was practical to provide for it.

It is plain from this record that plaintiffs' injury arose as the natural consequence of the building and maintenance of the solid grade embankment across the old channel at the initial letter "M" and over the low land immediately adjacent thereto. Such building and maintenance of the grade is not at all inconsistent with the grant contained in the deed, and in thus building the railway company was apparently proceeding in a manner best calculated to secure the safety of the traffic which would be moved over the road, as it was its duty to do. (*State ex rel. Bloomington etc. Co. v. District Court*, 34 Mont. 535, 115 Am. St. Rep. 540, 88 Pac. 44.) Furthermore, the deed does provide: "That neither said party of the second part [railway company] nor its agents have made any agreement, promise, or condition, verbal or written, for or relating to any crossing, passageway, or other privilege over, across, or under said railway; and that the right thereto shall be only that conferred by statute, or by an instrument in writing under the

corporate seal of the party of the second part." This is in effect a direct grant to the railway company to construct a solid grade embankment, except for the box flume and the underground passageway for livestock; and we must therefore assume that the railway company carried into execution the plan in contemplation by both parties to the deed at the time of its execution. Now, if the construction and maintenance of the railroad grade as it was built and maintained in the ordinary course of events so far interfered with the right of plaintiffs to maintain their dam and the head of their ditch as that damage would naturally result therefrom, then it must follow that, since the parties to the deed contemplated the use of the right of way as it was actually used, both Bachman and the railway company intended that any further use by the plaintiffs of their dam and ditch would be wholly at their own risk. Any injury which might result would be comprehended by the terms "*damnum absque injuria*." That the injury to plaintiffs was the natural result of the use to which the railway company put the right of way is demonstrated by this record. It is perfectly apparent that a like injury every year during the high-water period can only be effectually avoided by substituting trestlework for the solid embankment across the old channel and the low land; and there is not anything in the record to justify a court in imposing that burden upon the company, particularly in view of the grant contained in the deed, even assuming that the trestlework would be equally safe and as well adapted to the company's use.

There is a suggestion in appellants' brief that, in order to raise the question of the character of plaintiff's right, the defendant should have pleaded it; but it is a sufficient answer here to say that the evidence touching such right was admitted without objection, and will be given the same consideration on appeal as though it was fully warranted by the pleadings. (*Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724.)

The trial court held "that the plaintiffs were mere licensees in the construction of the ditch and dam in question; that their license was revocable; that the conveyance from Bachman to the defendant was a revocation of such license; that, therefore, defendant cannot be held for damages in this action; and that its motion for a directed verdict on the above grounds should have been granted." We agree with this view so far as it relates to the first cause of action, and, since that cause of action is now finally disposed of, judgment in favor of the defendant thereon should be entered.

The order granting a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MURPHY ET AL., RESPONDENTS, v. COOPER, APPELLANT.

(No. 2,803.)

(Submitted March 18, 1910. Decided April 2, 1910.)

[108 Pac. 576.]

Logs and Logging—Action on Contract—Insufficiency of Evidence—Appeal.

Appeal—Conflicting Evidence—Verdict—Conclusiveness.

1. Where, in an action at law, the testimony is conflicting in substantial particulars, the verdict of the jury will not be disturbed on appeal under an assignment that the evidence is insufficient to justify it.

Logs and Logging—Action on Contract—Insufficiency of Evidence.

2. Evidence adduced in an action to recover for services rendered in cutting timber, *held* to show that plaintiffs, who had been directed to confine their operations to timber standing upon defendant's lands, had trespassed on the public domain, for which unlawful cutting the defendant had paid damages as alleged in his counterclaim, and to be insufficient to justify a verdict in their favor.

Appeal—Rehearing—Questions not Reviewable.

3. The sufficiency of a counterclaim may not be called in question for the first time on motion for a rehearing in the appellate court.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by J. T. Murphy and another, copartners, doing business under the firm name and style of Murphy & Ryan, against Walter Cooper. From a judgment for plaintiffs and an order overruling his motion for a new trial, defendant appeals. Reversed and remanded.

Mr. George Y. Patten submitted a brief and argued the cause orally in behalf of Appellant.

In behalf of Respondents, there was a brief and oral argument by *Mr. George D. Pease*.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from a judgment in favor of the plaintiffs and from an order of the district court of Gallatin county, overruling the defendant's motion for a new trial.

The action was brought to recover the sum of \$2,235.40 as a balance alleged to be due on an account for work, labor and services performed by plaintiffs in cutting, hauling and delivering railroad ties and other timber, in Bear Canyon, Gallatin county, for the defendant between November 1, 1905, and August 1, 1908. The answer admits the allegations of the complaint and that the amount claimed by the plaintiffs is due them; but it is asserted that the sum of \$1,872.30 should be deducted therefrom by way of counterclaim. For such counterclaim defendant alleges that on or about September 24, 1906, the parties entered into an oral contract, by the terms of which plaintiffs were to cut for him all the railroad ties which could be made from the timber on certain lands belonging to him in sections 16, 17, 20 and 28, township 3 south, range 7 east, Bear Canyon, in Gallatin county, for which he was to pay them thirty cents for No. 1 ties, eighteen cents for No. 2 ties, and six and one-half cents per stick for lath timber, to be made from the tops of the tie timber; that pursuant thereto plaintiffs cut a

large quantity of timber between September 24, 1906, and April 1, 1908, and, while so engaged, the plaintiffs willfully and negligently, in the course of such cutting, entered upon certain lands belonging to the United States, in sections 8, 9, 17, 21 and 28, in the same township and range, and there cut, in trespass, certain timber, for which the defendant was compelled to, and did, pay to the federal government the sum of \$1,250.10; that they left upon the ground certain brush, slashings, and refuse; that the defendant has been compelled to give to the government of the United States a bond in the sum of \$300, as a guaranty that he will clear up such brush, slashings and refuse; that the same will cost him about \$120.20; that, further, by reason of said trespass he was required to and did expend the sum of \$500 for surveys in re-establishing his lines, and in settling such trespass. He further alleges that he notified the plaintiffs of the claims made by the officers of the United States on account of such trespass, and of the fact that he would be compelled to pay the same, and that he would charge the amounts thereof to them and deduct them from the sum due them under the contract, to which they assented. In their replication plaintiffs admit that they entered into the contract, but they allege that according to its terms the ties and timber were to be cut by them on lands designated by defendant; that no particular lands were designated by him at the time the agreement was entered into, but it was understood and agreed that the defendant was to survey and designate on the ground the lands from which the timber was to be cut, from time to time, as plaintiffs were ready to cut the same. They deny that they cut any timber from government lands, but allege that, if they did so, it was on account of the fact that such timber was designated by defendant. They deny any knowledge or information sufficient to form a belief as to whether the defendant has been compelled to pay any moneys to the United States government, and they deny positively that they ever assented to any settlement between defendant and the United States, or that any amount should be charged to them. The cause was tried to the

court sitting with a jury. A general verdict was returned in favor of the plaintiffs for the full amount claimed by them, upon which verdict judgment was entered.

It is contended (1) that the court erred in admitting and rejecting certain testimony; and (2) that the evidence is insufficient to justify the verdict. There are thirty-five specifications and assignments of error found in appellant's brief, but they have all been grouped under the two general contentions noted above. We shall first consider the second assignment, and will remark, in passing, that this was peculiarly a case wherein special findings would have greatly simplified the work of the district court, as well as of this court, and would have removed a certain element of uncertainty which has occasioned some embarrassment and much extra research and consideration of the testimony found in the record.

Walter Cooper testified that the contract was made in his private office between himself and Murphy; that in the course of the conversation Murphy said that he was perfectly familiar with the lines of defendant's lands; that they had a blue-print and a compass; that Murphy was told they must adhere to the lines of defendant's land, because the price was such that he could not afford to pay a man to direct them, whereupon Murphy said that they were old tie-makers, and as such were familiar with the compass and with running lines, and were perfectly able to look after that part of it; that it was understood they were to cut from defendant's lands; that he told Murphy that, if they could not keep within the lines, he would not enter into the agreement, because there was "nothing in it." He also testified that, when the government officials called his attention to the fact that timber had been cut in trespass, he had several conversations with plaintiffs, told them where the trespasses complained of were alleged to have been committed, and they said they had cut the timber there. He said: "I told them this would have to be paid for, and I told them I was in a position where I had no option in the matter. I told them I must pay, as having received this property without having knowledge of

its having been taken from government lands. They did not have very much to say about it. They did not object—they said they supposed it 'had to be paid for. * * * A portion of this material that the government alleged had been cut in trespass was yet in the timber and had not been delivered. * * * They asked me to see Mr. Conkling, who had control of the forest operations, and see if he wouldn't let them deliver the balance of the timber so that they could get the benefit of the hauling. This I did, and Mr. Conkling said it was all right for them to go and deliver the timber on the flume. We said we would charge them whatever we had to pay the government, less the hauling. This agreement seemed to be satisfactory to them. We have paid the government the amounts claimed by it for those different trespasses. * * * I made a memorandum at the time of the contract with Murphy, as follows:

“ ‘Bozeman, Sept. 24, 1906.

“ ‘Made contract with Murphy & Ryan to-day to make and deliver on my flume all railroad ties that can be made from timber found on my land, situated in sections 16, 17, 20 & 28, as shown by blue-print of same in 3 S. 7 E. Bear Canyon, for which I agree to pay 30c each for No. 1 ties and 18c for No. 2 ties; for lath timber made from tops 6½c per stick, for sticks 4½ in. to 8 in. in diameter at top and 8 ft. long, delivered on flume, and received and inspected from time to time as delivered.

“ ‘Agreement with Jack Murphy.

“ ‘WALTER COOPER.’

“ ‘Says no ties on 17.’ ”

George Bramble testified: “ ‘Murphy said to me, ‘We got over the lines—cut timber over the lines.’ I says, ‘Aren’t you afraid to go in there and making trouble of it?’ He says, ‘No, it will only cause the old man (meaning Cooper) to pay stumpage.’ I says, ‘The timber isn’t very good, is it?’ He says, ‘Yes, the timber is fine.’ ” Murphy denied having such conversation.

J. W. Freeman, United States district attorney, testified that he had compelled Cooper to pay for the timber cut in trespass.

H. W. Trask testified that he was bookkeeper and confidential man for Mr. Cooper. He said: "I had charge of the business in Bear Canyon. I was able to go once or twice a month and look over the various work personally. I had been assured at all times by both Murphy and Ryan that they knew where Mr. Cooper's lines were and had run them. * * * They had given me to understand that they had better knowledge than anybody else. The question of the locality of their cutting with reference to their general work was discussed frequently.

* * * I have had conversations with them as to what timber was comprehended under the contract, to the effect that they were to cut strictly within the lines of Mr. Cooper's lines, * * * and I have asked both Murphy and Ryan as to whether or not they were cutting within Mr. Cooper's lines, and they both assured me they were. They had a blue-print or map of Mr. Cooper's lands and also a standard make of surveyor's compass. I saw one of their men making ties off of Mr. Cooper's land, and they told me they would move him off right away. Neither of the plaintiffs at any time made any objection to a settlement of those trespasses; nor did they at any time make any dispute or deny their commission of the trespasses."

David T. Conkling testified: "I am in charge of the Gallatin Forest. I had a conversation with Ryan, and he told me they cut so much stuff from government land because they were looking for the best timber they could find. In the conversation that I had with them neither of the plaintiffs ever made any denial of the fact that they had committed these trespasses, * * * although I never had a positive admission from them that they did the cutting. It was a generally understood fact, and no denials were made by them. * * * I asked Murphy if he was furnished a blue-print, and he told me he had one. * * * The lines referred to were imaginary lines and were hard to find."

John T. Murphy, one of the plaintiffs, gave the following version of what took place between himself and Mr. Cooper at the time the contract was made: "I told Mr. Cooper I had been up in Bear Canyon, what I saw, and we discussed prices, and finally he told me to go ahead and go to work in that country, and he also promised me the timber on section 21. I insisted on that timber, and he agreed to keep it for me, because there was timber on that section handy to the flume. We were to cut in cull timber. * * * No memorandum was made by Mr. Cooper or anybody at that time. I didn't tell him we were familiar with his lands. I told him I knew where I had been working for five years up to that date. I had worked there for him before on this same cull timber, except in section 28. I wasn't familiar with the lines with reference to this cull timber. He didn't furnish me with any blue-print or compass at that time. There was a blue-print left with my wife at camp, but I didn't know when it was left there. Mr. Cooper didn't tell me that if we couldn't cut within the lines he didn't want us to cut at all. There were no lines up there blazed out that we could go by. We never admitted to Mr. Cooper that he could charge any sum against us for any alleged trespass. I never at any time consented that those charges be made against me and Mr. Ryan. The first time I came to town I told Mr. Cooper I didn't think I ought to pay a cent and didn't know I had to pay. * * * It was agreed we were to cut on 28, also on 21. As to whether it was my understanding that our cutting was to be confined to 21 and 28, I will say it was to be there and in other places where we could find timber. He wanted us to clean 21 and 28 up that winter, and afterward other places we could find timber. We could work and clean that upper country up that winter. Q. And so the agreement was that you could work wherever you found timber, and the agreement was that you could cut on 21 and 28 and other places after you finished that? A. No, we were to cut— Q. What did he say with reference to that, with regard to other timber? A. There was no contract at all. Q. So the contract was simply to cut timber on 21 and

27 [28]? A. Those were the places mentioned. Q. And that was the extent of the contract, was it? A. We had men working at the time, and he didn't say what to do with them, and I told him we would move them up as soon as we could. Q. You had a contract on September 24, 1906? A. Yes, sir. Q. What was said at that time? A. Nothing, only I was to get the price for ties. Q. I am asking you as to the place. Was there any agreement that you were to cut elsewhere than on sections 21 and 28, at that time? A. I don't know as there was. Q. Will you say there was not? A. No, I won't say. I won't say that I remember whether there was or not. Q. You remember the agreement you had at that time? A. I know the prices. Q. Was that all you were concerned in? A. I know I was to work on 28, and I was to have 21. Q. I am asking you as to the agreement. A. I told Mr. Cooper unless I could have this timber on 21 I didn't want any. Q. We have disposed of 21. You said the contract was you were to cut on 21 and 28. A. And I was to build a camp on 28. Q. So far as you can recall, there was no other agreement with reference to cutting timber besides on sections 21 and 28 at that time? A. There may have been. Q. You say there was or was not? A. I don't say either way. Q. You have no recollection of anything of that kind? A. Not positive. That is all I can tell with reference to the contract at that time as to the places where the timber was to be cut. * * * I don't remember anything said by him about cutting within the lines at that time. * * * He didn't tell me he had had previous trouble with trespass matters. I believe he also said he wanted us to be careful and keep within the lines. * * * Nothing was said with reference to our keeping in the lines, but I think he said he had had trouble on the West Gallatin. As to whether he warned me to keep within the lines and avoid trespass, I will say that I told him that I knew the lines. I knew where the lines were on one corner. I supposed I knew where the ground was, but not where the lines were. As to how I knew where the lines were, I will say that it was because I worked for him on the same ground.

for four or five years. I kept within the lines of the slashings. I didn't go beyond where other people were working, and that was the theory I was going on with Mr. Trask and Mr. Cooper, and on 28 my knowledge of Mr. Cooper's lands I had none, and in that proposition to Mr. Cooper or Mr. Trask I had none until after the survey made by Mr. Robertson. I never said to Mr. Cooper or Mr. Trask that I knew where the lines were.

* * * I think it is true that these trespasses that were testified to by Mr. Trask, Mr. Cooper, Mr. Conkling, and Mr. Hayes were the lands our men cut upon. It is not a fact that I stated to Mr. Conkling that we cut beyond Mr. Cooper's lines and on government land because we wanted good timber. * * * I had every reason to think that the ground belonged to Mr. Cooper, and I told Mr. Trask so, and that I wasn't going to stand for it. * * * All of the ties cut in trespass were cut by us and our men mostly, and the tie cutting that was done on sections 16, 17, 20, 21, and 28, after the contract was entered into, was done by us and our men, with the exception of some mine ties Mr. Trask had made."

J. W. Ryan, one of the plaintiffs, testified: "The reason we cut on government land was that there was no way of telling where we were working. They were supposed to be their lands. We never found any lines there to show us. * * * A blueprint came in there, I guess it was shortly prior to the time this contract was made." In answer to the question, "Did you commit these trespasses on the ground in question?" he answered, "We done this cutting alleged to have been in trespass which was charged against Mr. Cooper, except a small portion of it."

We think it altogether unreasonable to suppose, in view of the foregoing testimony, that the jury could have found that the timber cut in trespass, for which Cooper was obliged to pay, was not cut by plaintiffs and their men. Both plaintiffs virtually confessed that the greater portion of it was cut by them. So that, in order to arrive at the conclusion that they were entitled to a verdict for the full amount of their claim, the jury

must have found that they did not undertake to cut within the lines of Cooper's lands, as known to them. Cooper testified positively that Murphy did so agree. Bramble said that Murphy spoke of getting over the lines. Trask's evidence was to the effect that both of the plaintiffs told him that, by the terms of the contract, they were to cut strictly within Mr. Cooper's lines; and Conkling testified that Ryan said that they cut so much stuff from government lands because they were looking for the best timber they could find. We may assume that this testimony is all contradicted. The question for decision is, however: What were the terms of the contract between Cooper and Murphy? We have Cooper's version. No third person was present. What does Murphy say about it? If there is a substantial conflict in the testimony of these two parties, the verdict of the jury must remain undisturbed. Let us first look to the allegations of the verified replication. We find it there alleged that "the said timber [was] to be cut from such lands as should be designated from time to time by the defendant." And again: "These plaintiffs allege that according to their said agreement such ties and timber were to be cut by plaintiffs on lands designated by the defendant, but no particular sections or lands were designated or described by the defendant at the time said agreement was entered into, but it was understood and agreed that the defendant was to survey and designate on the grounds the lands from which said timber was to be cut from time to time as the plaintiffs were ready to cut the same, and all of said timber so cut by the plaintiffs was to be received and inspected from time to time as delivered on said flume, and these plaintiffs deny that the agreement was otherwise than above stated by them." And again: "Plaintiffs allege that if they ever cut any timber of any kind or description from any government lands, that they were not at fault in so doing, and that the same was cut by them because such timber was designated by the defendant to be so cut by them." There is no testimony whatsoever to substantiate these allegations. Murphy's narration of the transaction contains no intimation that Cooper agreed to designate the lands

from time to time during the progress of cutting. The record discloses the fact that Cooper owned lands in sections 21 and 28. Murphy's testimony seems to indicate an anxiety to be allowed to cut on section 21, and he says it was finally agreed that they should cut on sections 21 and 28. We have no doubt that, if the contract contained no other provisions, it should be interpreted as confining the plaintiffs' operations to these two sections of land. But Murphy testified that, according to the terms of the contract, they were to cut on sections 21 and 28 "and in other places where we could find timber." It then became very material to ascertain where, according to the contract, those other places were. He testified that they were not to work wherever they found timber, after they finished cutting sections 21 and 28. And this testimony was followed by his declaration that there was "no contract at all" with regard to other timber, and that the places mentioned were sections 21 and 28. Finally, in answer to the direct inquiry as to what was said at the time the contract was made, he said, "Nothing, only I was to get the price for ties," and he finished his testimony on this branch of the case by stating that he did not know "as there was any agreement" that they were to cut elsewhere than on sections 21 and 28; that he did not remember whether there was or not; that there may have been some other agreement with reference to cutting elsewhere; that he would not say either way; and that he had no positive recollection of anything of that kind. Thereupon he limited the terms of the contract strictly to sections 21 and 28, by saying that he could tell nothing more with reference to the places where the timber was to be cut.

Viewing this testimony in its most favorable light, and bearing in mind that the burden of proof rested upon the defendant, it not only fails to prove the affirmative allegations of the replication, but in our judgment substantially corroborates the testimony of the defendant himself. The latter's motion for a directed verdict should have been sustained.

We recognize the difficulty of the plaintiff Murphy's position. It appears that he was unable to substantiate the allegations of

his replication, quoted above, and he was therefore left in a situation where he must either confess that he was to cut within the lines of the defendant's lands, or that he agreed to cut timber belonging to the government of the United States. It seems unnecessary to comment upon the apparent contradictions in other parts of his testimony. Neither is it necessary, as it seems to us, to discuss other specifications of error found in the brief of counsel.

In deciding this appeal we have confined ourselves strictly to the case presented to this court. This we believe to be the proper course for an appellate court to pursue. It is not to be understood, however, that the decision establishes the precedent that the correct theory of the relative rights and obligations of the parties was adopted in the court below. We have not considered that question.

The judgment of the district court and the order denying a new trial are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ON MOTION FOR REHEARING.

(Submitted April 28, 1910. Decided April 30, 1910.)

MR. JUSTICE SMITH delivered the opinion of the court.

Respondents' counsel claim that the court overlooked the question whether the appellant's counterclaim states facts sufficient to constitute a cause of action. In view of what is said in the last paragraph of the foregoing opinion, we do not think the learned counsel can consistently claim that it was the court which overlooked the question. We do not decide that the counterclaim is insufficient. It is too late to raise that question for the first time on motion for a rehearing.

Rehearing denied.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. COBURN, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 2,842.)

(Submitted March 19, 1910. Decided April 2, 1910.)

[108 Pac. 144.]

Contracts of Employment—Place of Payment—Venue—Prohibition.

Contracts—Place of Payment.

1. In the absence of an agreement on the subject, a debt is payable where the creditor resides, or wherever he may be found.

Same—Intent of Parties.

2. What was actually intended by the parties to an agreement at the time they entered into it becomes as much a part of it as if express provision had been made therefor, if there is not anything in the contract inconsistent therewith.

Same—Place of Performance—Venue—Prohibition.

3. The complaint, in an action for wages due, did not in terms allege that under the contract of employment the services were to be performed and payment made for them in B. county; it did set forth, however, that the mine, in which plaintiff alleged he rendered them, was situated in that county, and that upon their rendition defendants became plaintiff's debtors. Defendants interposed a demurrer, and asked for a change of venue to the county of their residence. This motion was denied. Section 6504, Revised Codes, provides that an action on a contract may be tried in the county in which the contract was to be performed. *Held*, under the record as made on application for writ of prohibition to restrain the district court from retaining jurisdiction, that the parties must have intended that the contract should be construed in the light of the rule stated in paragraph 1 above, and that the entire contract, including the making of payment, should be performed in B. county, and that therefore, under section 6504 above, the cause was properly triable in that county.

APPLICATION by the state, on the relation of Wallace Coburn, for writ of prohibition, against the district court of the ninth judicial district in and for the county of Broadwater and Hon. W. R. C. Stewart, Judge thereof. Dismissed.

Messrs. Galen & Mettler, and *Mr. W. D. Tipton*, submitted a brief in behalf of Relator. *Mr. Tipton* argued the cause orally.

In behalf of Respondents there was a brief and oral argument by *Mr. John A. Mathews*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In December last John J. Warren commenced an action in the district court of Broadwater county against Wallace Coburn and others to recover wages for work and labor done by Warren and the others, whose claims had been assigned to him. The complaint in that action alleges that the defendants were engaged in operating the Silver Wave mine in Broadwater county. The claim asserted by Warren for wages earned by him individually is typical of all. In that respect his complaint alleges that at the Silver Wave mine, in Broadwater county, and at the special instance and request of the defendants, he performed 104½ days' work, as a miner, for the defendants, at the agreed price of four dollars per day, less one dollar per day for board. Service of summons was made upon defendants Wallace Coburn and Larssen, in Lewis and Clark county. Those two and defendant Templeton appeared by demurrer, and also filed a motion asking the court to change the place of trial to Lewis and Clark county, on the ground that none of the defendants reside in Broadwater county, that all of them were served with summons in Lewis and Clark county, and that defendants Wallace Coburn and Larssen are residents of the last-named county. This motion recites that it is made upon the affidavit annexed thereto. The only affidavit appears to be one by defendants Wallace Coburn and Larssen, to the effect that each was served with summons in Lewis and Clark county, and that each was, at the time of the commencement of the action, ever since has been, and now is, a resident of Lewis and Clark county. The district court denied the motion, and directed the defendants to answer. Application was thereupon made in this court for a writ of prohibition, restraining the district court from proceeding further in the action. The alternative writ was issued, and the district court appeared by answer, which merely sets forth the proceedings had in the lower court, more in detail, but does not raise any material issue of fact. The matter was thereupon submitted to this court for determination.

We do not decide that prohibition is an available remedy in an instance of this kind. That question was not raised nor argued in this court. The only question submitted was: Was the contract for the breach of which Warren sued to be performed in Broadwater county?

Section 6504, Revised Codes, provides: "Actions upon contracts may be tried in the county in which the contract was to be performed." It will be observed from the statement above that the complaint does not in terms allege that the contract of employment was made or was to be performed in Broadwater county; but it does disclose that the place of employment was in that county, that the services were rendered there, and that defendants thereupon became debtors to plaintiff and his assignors for the wages earned. Under these circumstances we think the rule running through the law of contract generally, except with reference to negotiable promissory notes, should be invoked, viz.: "It is the duty of the debtor to find the creditor and make tender to him, and not the duty of the creditor to find the debtor and make demand for payment." (3 Page on Contracts, sec. 1420; Hughes on Tender, sec. 312.) It has been the rule in England for centuries that, where the place of payment is not specified, the debtor must seek his creditor, if within the "four seas," and make tender to him. (Sheppard's Touchstone, sec. 136; 2 Story on Contracts, sec. 1329.) The same rule is announced by other authorities, as follows: "In the absence of any agreement upon the subject, a debt is payable where the creditor resides, or wherever he may be found; and ordinarily the debtor in such case is bound to seek the creditor to make payment to him, provided the creditor is within the state when the payment is due." (30 Cyc. 1185.) "If no place for the payment of a money obligation is specified, the debtor is required to seek the creditor and make payment to him personally." (22 Am. & Eng. Ency. of Law, 2d ed., 533.)

If at the time this contract of employment was entered into there was not any place of payment mentioned, the parties will be held to have intended that the contract should be construed

in view of the rule of law above, and what was actually intended becomes as much part of the agreement as any express provision, if there is not anything in the contract inconsistent therewith. In other words, in the absence of anything more specific than appears from this record, we hold that the entire contract was to be performed at the mine in Broadwater county, and that the parties to the agreement never contemplated that the men engaged in daily labor at the mine should have to go to some other county to collect their wages. (See, also, *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90.)

The trial court properly denied the motion for a change of venue, and these proceedings are therefore dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MCINTYRE, RESPONDENT, v. MACGINNISS, APPELLANT.

(No. 2,805.)

(Submitted March 19, 1910. Decided April 2, 1910.)

[108 Pac. 353.]

Mechanics' Liens—Contiguous Mining Claims—Notice—Account—Sufficiency—New Trial—Premature Service—Waiver.

New Trial Notice—Premature Notice—Effect.

1. Service of notice of intention to move for a new trial, made before notice of entry of judgment, is premature and ineffective as a basis of the motion.

Same—Entry of Judgment—Notice—Waiver.

2. Though a party intending to move for a new trial may waive formal notice of the entry of judgment by instituting his proceedings in support of his motion without it, such waiver may not be imputed to him where he inadvertently proceeds before he may properly do so.

Same—Notice of Appeal—Service—Adverse Party.

3. Where one of several defendants served his notice of intention to move for a new trial and his notice of appeal upon the only one of his codefendants who had any interest in opposing the relief sought

by the motion and appeal, the service was sufficient as against the objection that all the adverse parties had not been served.

Mechanics' Liens—Mining Claims—Extent.

4. The provision of section 7293, Revised Codes, limiting the operation of a mechanic's lien, does not apply to mining claims; a lien upon such property extends to the whole claim.

Same—Notice—Sufficiency.

5. A notice of lien upon a lode mining claim which failed to mention the claim by name was nevertheless sufficient to indicate the area within which the work was alleged to have been done, where such claim fell entirely within the boundaries of a placer location which had been properly described.

Same—Contiguous Mining Claims—Notice.

6. Notices of mechanics' liens for labor performed on a number of contiguous lode mining claims may properly be prepared upon the theory that the whole group constitutes a single consolidated claim, where such work is reasonably adapted to the development of all the claims.

Same—Who Entitled to Liens.

7. For labor performed in the exploitation and sampling of mining claims—such as in making repairs and alterations, building of roads, cutting of cordwood for fuel, keeping machinery in order, clearing away of debris, and the like, liens may properly be filed.

Same—Notice of Lien—Account—Contents.

8. One desiring to file a mechanic's lien need not classify the character of work done or set out the items of it in the account filed with the notice; all that is required under section 7291, Revised Codes, is an honest statement from which it may be understood what amount is claimed.

Same—Contiguous Mining Claims—Extent of Lien.

9. Where a group of seven mining claims were improved as a consolidated claim, men employed on the enterprise were entitled to a lien on the entire group, and the fact that they limited their liens to only three of the claims did not destroy their right altogether.

Same—Lessees—Liability.

10. Where work on a group of mining claims was done at the instance of lessees, who in part paid therefor, they were personally liable for the amount unpaid, whether they were technically partners or not.

Same—Appeal—Erroneous Judgment—Who may not Complain.

11. A lessee of mining claims upon which a quartz-mill had been erected and in which entire property a bank, also made defendant, claimed an interest, against whom a judgment enforcing mechanics' liens had been properly entered, could not complain because the judgment ordered that in case the proceeds of the sale of his interest were not sufficient to discharge the debt, the entire mill should be sold. The bank, the owner of the other interest, was the only party entitled to complain of this part of the judgment.

(MR. JUSTICE SMITH dissenting in part.)

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by R. B. McIntyre against the Montana Gold Mountain Mining Company and others. From a judgment for plain-

tiff and an order denying his motion for a new trial, defendant John MacGinniss appeals. Affirmed.

In behalf of Appellant, there was a brief and oral argument by *Mr. John F. Davies*.

Mr. M. P. Gilchrist and *Mr. W. D. Kyle*, submitted a brief in behalf of Respondent; oral argument by *Mr. Kyle*.

No particular form of lien statement is required. All that is necessary is that the language used in the statement must convey and express in an intelligent manner the meaning and intent of the statute. To hold otherwise would be in effect, in many instances, to defeat a just and equitable claim on mere technicalities. (*Ford v. Springer Land Assn.*, 8 N. M. 37, 41 Pac. 541.) Nicety of form is not essential. (*Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111; *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1090; *Baldwin v. Spear Bros.*, 79 Vt. 43, 64 Atl. 235; 2 Jones on Liens, sec. 1391; *Riter v. Houston*, 19 Tex. Civ. App. 516, 48 S. W. 758.) Where a lien notice is offered in evidence for the purpose of establishing the lien, all objections going to its execution are waived by a failure to urge such objections at the time of its offer in evidence, and they will not be considered on appeal. (*Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Noll & Thompson v. Cumberland*, 112 Tenn. 140, 79 S. W. 380; *Luttrell & Co. v. Knoxville Co.*, 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565.)

Defendant MacGinniss having been adjudged liable for the debt set out in the lien, the fact that the lien did not describe all the property against which foreclosure thereof was decreed would not affect the validity of the lien as to the property therein described. (20 Am. & Eng. Ency. of Law, 2d ed., 422; *Culmer v. Clift*, 14 Utah, 286, 47 Pac. 85; *Mivelaz v. Johnson*, 124 Ky. 251, 124 Am. St. Rep. 398, 98 S. W. 1020, 14 Ann. Cas. 688.)

Where two or more mining claims are operated as a group or whole, as against the party or parties so operating them, a

lien for work done on any one of such claims attaches to all. (*Hamilton v. Delhi Mining Co.*, 118 Cal. 148, 50 Pac. 378; *Phillips v. Salmon River Co.*, 9 Idaho, 149, 72 Pac. 886; *Idaho Mining & Mill Co. v. Davis*, 123 Fed. 396, 59 C. C. A. 200; *Berentz v. Belmont Oil Co.*, 148 Cal. 577, 113 Am. St. Rep. 308, 84 Pac. 47; *Williams v. Mining Co.*, 102 Cal. 134, 34 Pac. 702, 36 Pac. 388; *Malone v. Mining Co.*, 76 Cal. 578, 18 Pac. 772; *Pacific Co. v. Irrigation Co.*, 120 Cal. 94, 65 Am. St. Rep. 158, 52 Pac. 136.)

A lien is not defeated by the failure of the description to cover as much property as it might have covered. (20 Am. & Eng. Ency. of Law, 2d ed., 422; *Culmer v. Clift*, 14 Utah, 286, 47 Pac. 85; *Mivelaz v. Johnson*, *supra*.)

The following cases are cited in support of the proposition that labor in hauling material used and machinery installed in a mill will support a lien therefor: *In re Hope Mining Co.*, 1 Saw. (U. S.) 710, Fed. Cas. No. 6681, 9 Morr. Min. Rep. 364; *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30; Snyder on Mines, sec. 1690; *Kehoe v. Hansen*, 8 S. D. 198, 59 Am. St. Rep. 759, 65 N. W. 1075; *Bates Machine Co. v. Trenton*, 70 N. J. L. 684, 103 Am. St. Rep. 811, 58 Atl. 935; *Fowler v. Pompelly*, 25 Ky. Law Rep. 615, 76 S. W. 173; *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518; *Jones v. Kruse*, 138 Cal. 613, 72 Pac. 146. The authorities also hold that pipe laying, some work of this character having been done on the property in question, is lienable work. (*O'Neil v. Taylor*, 59 W. Va. 370, 53 S. E. 471; *Wells v. Christian*, 165 Ind. 662, 76 N. E. 518; 20 Am. & Eng. Ency. of Law, 2d ed., 309.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff to recover of defendants Montana Gold Mountain Mining Company (hereafter referred to as the company), John MacGinniss, B. T. Spaulding and James Breen for services performed by him as a laborer, at their instance and request, between August 1, 1907, and Novem-

ber 1, 1907, and to establish a lien for the amount alleged to be due upon three mining claims, with a mill thereon, situate in Silver Bow county, upon which the labor was performed, and of which the said defendants are alleged to be the owners. Plaintiff also sued as assignee of sixteen other claimants for similar services rendered to the same defendants at various times between August 1, 1907, and December 5, 1907, setting forth these claims in separate counts. The amended complaint, after alleging facts sufficient to support a judgment for the different amounts alleged to be due as upon account, alleges the filing of notices of claim of lien by plaintiff and each of his assignors in conformity with the requirements of the statute. The Silver Bow National Bank (hereafter referred to as the bank) was made a defendant because it asserts an interest in the property upon which plaintiff claims liens. Several other persons from whom the company acquired its interest in the property were also made parties defendant; but at the close of the hearing the action was dismissed as to them. Breen appeared by filing a demurrer to the complaint, but no disposition was ever made of it, and, as to him, the action is still pending in the district court. Spaulding suffered entry of default for failure to appear. The answer of MacGinniss and the company denies generally all the material allegations of the complaint. In addition to the same general denials, the bank alleges that on October 15, 1907, it became the owner of the mill by purchase from Spaulding, together with all the tools, machinery, and appliances therein, and is now the owner thereof. This allegation the plaintiff puts in issue by reply. The court found for plaintiff, as against defendants MacGinniss and Spaulding, for the full amount claimed in each count of the complaint, except one. As to this no evidence was offered. It rendered and caused to be entered a personal judgment against them, and declared the plaintiff entitled to liens upon the property for the several amounts due, and to have sale of it to satisfy his judgment, as follows: First, an undivided interest in the mining claims and in the mill and other improvements thereon, belonging to MacGinniss;

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and, second, in case the proceeds are not sufficient to satisfy the judgment, of the entire mill. Plaintiff was also awarded counsel fees, to be paid out of the proceeds of the sale. The defendant MacGinniss has appealed from the judgment and an order denying his motion for a new trial.

1. When the record was filed in this court, counsel for plaintiff submitted a motion to affirm the order denying the motion for a new trial, on the ground that the notice of intention had not been served upon all the adverse parties, and because it had not been served in time. They also submitted a motion to dismiss the appeal from the judgment, on the ground that the notice of appeal had not been served upon all the adverse parties. Disposition of these motions was deferred until hearing upon the merits, because a determination of them required an examination of the entire record. Now that we have made this examination, aided by the argument and admissions of counsel, we have concluded that the motion should be denied.

Proceedings on the motion for a new trial were first instituted by MacGinniss by serving his notice of intention after the decision was made, but before entry of judgment. These proceedings were premature. Under the statute, a party intending to move for a new trial may do so by serving his notice within ten days after the notice of entry of judgment, but not before. (Revised Codes, sec. 6796.) When the bill of exceptions first prepared in the case was submitted to the trial judge for settlement, it was found by counsel for MacGinniss that the notice of intention had been served prior to the entry of judgment. Thereupon, having then for the first time knowledge of the entry of judgment, counsel abandoned the proceedings as nugatory, and served and filed a new notice. The proceedings on the motion based upon the second notice were timely; for, though formal notice of the entry of judgment may be waived by the moving party by instituting his proceedings in support of his motion without it, such waiver is not properly imputable to one who inadvertently institutes his proceedings before the time at which he may do so. Both the notice of intention and the

notice of appeal were served upon Spaulding, the only party who appears upon the record to have any interest in opposing the purpose sought to be accomplished by the motion for a new trial and the appeal, *viz.*, the vacation of the judgment. The fact of service does not appear of record; but counsel for defendant MacGinniss during the oral argument on the motions in this court having repeated a statement made in his brief, to the effect that the service had in fact been made of both notices, this statement was accepted by counsel for plaintiff as true. This dispensed with the necessity of an amendment to the record showing the fact, which counsel for defendant stated they were ready to make.

2. On the merits, the first contention is that the court erred in admitting in evidence the notices of lien, for the reason that they do not describe the property upon which the work was done, nor properly indicate the character of the work. It is argued that there are three classes of liens claimed, to-wit: Certain ones for work done exclusively in the mine; others for work done exclusively in the construction and operation of the mill; and still others for work done both in the mine and in the mill; and that, since the notices do not segregate the items for work done upon the different parts of the property and specifically describe such parts, they furnish no basis to support a claim of lien, either upon any specific part of the property or upon the whole of it as a unit. It is also said that the statute does not grant a lien for repair work, or for the cutting of cordwood, and that certain of the claims for work done in this behalf are made without authority of law. These contentions will be better understood if a brief statement be made of the circumstances under which the lienors were employed and the situation and character of the property upon which the work was done.

The company and MacGinniss were in 1906 owners as tenants in common of a contiguous group of mining claims, seven in all. Defendant Spaulding, having in the latter part of that year obtained an option from the stockholders of the company to purchase all of its capital stock held by them if the claims should

after thorough examination and test by sampling prove of sufficient value to justify the purchase, the option contract authorizing him to take possession of the property for that purpose, and to build a sampling mill if necessary, assigned to MacGinniss and Breen certain shares of his option. Thereupon the three, Spaulding and MacGinniss acting for Breen, took possession, and in August, 1907, began the erection of a sampling mill near the portal of a tunnel which had theretofore been driven into the mountain upon a claim designated as the "Clara Jurgens." Previous to taking possession MacGinniss and Spaulding entered into a contract with the stockholders of the company to redeliver the property to them in case they failed to take up the option, free from liabilities or encumbrances of any kind or character. The tunnel mentioned extends into the mountain about 800 feet, passing entirely through the Clara Jurgens claim and into the "Mabel Beal," a contiguous claim on the north. Immediately to the south is another claim in the group, designated "Placer Lot No. 42." Covering a part of the placer, and overlapping a portion of the Clara Jurgens on the south, is still another claim, designated as the "Central Lode." The mill is situated within the boundaries of this claim, and upon the boundary line between Placer No. 42 and the Clara Jurgens claim. Some of the men employed by Spaulding and MacGinniss worked exclusively in the construction of the mill and in operating it. Others worked exclusively in making repairs to the tunnel and in the pursuit of mining operations conducted in the Clara Jurgens claim. The repair work in the tunnel extended to its full length, and was therefore done in part within the boundaries of the Mabel Beal claim. Some of the men were employed in building a roadway, so that teams could reach the mill. Others were hired to cut cordwood for use as fuel in the boiler house connected with the mill. Still others were engaged exclusively in construction work upon additions made to the mill building, and alterations and repairs made in the machinery. Some did a small amount of work in gathering samples of ore from claims not mentioned in the

notices. None of them were employed under special contract, but all worked for wages at an agreed rate per day.

The contention is that, the plaintiff and his assignors having failed to specify in the accounts attached to their respective notices exactly the amount due them for each kind of work done by them, whether it was construction work or upon repairs, or in mining or road building, and to limit the claim of lien to the specific portion of the property upon which the work was done, the notices are insufficient, and should therefore have been excluded from the evidence. The statute declares: "Sec. 7290. [Revised Codes.] Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any other person performing any work and labor upon, or furnishing any material, machinery or fixture for any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas or water works or plant, or any improvements, upon complying with the provisions of this chapter, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done, or material furnished." It is apparent from even a casual reading of this provision that the legislature intended to provide for a lien in favor of any person who bestows labor upon any character of property as such, or by whom material is furnished for the improvement of the property. That this is so is clear from the declaration at the close of the section that such person "has a lien upon the property upon which the work or labor is done, or material furnished." Under other provisions, the extent to which property, other than mines, is affected by the lien, is defined and limited. If the structure and land upon which it is situated both belong to the same person, the lien extends to the lot or lots occupied by the structure, if within a city or town, or to one acre of land if it is outside a city or town. If the interest of the person owning the structure is less than the fee, the lien affects his interest only. (Revised Codes, sec.

7293.) In the latter case the structure may be sold and removed within twenty days after sale. (Id., sec. 7294.) It was pointed out in *Smith v. Sherman Min. Co.*, 12 Mont. 524, 31 Pac. 72, however, that the limitations prescribed in section 7293, *supra*, do not apply to mining claims, but that a lien upon such property extends to the whole claim; and this must be so, because such claims cannot be divided, and the improvements or structures put upon them often cannot be removed. They generally consist of shafts, tunnels, and similar excavations. The rule stated in *Smith v. Sherman Min. Co.* was held to be the rule under the statute of 1868 (Laws 1872, p. 509, sec. 1) in *Alvord v. Hendrie*, 2 Mont. 115. This statute has been amended in various other particulars, but the section referred to has been brought forward into the different compilations of our laws substantially as it then stood. In *Alvord v. Hendrie*, *supra*, it was held that, where one had expended work partly on a quartz claim and partly upon a mill erected thereon, he could claim and enforce a lien upon both the claim as an entirety and the mill. The decision in *Smith v. Sherman Min. Co.* proceeded upon the theory that, since the limitations declared in section 7293 cannot properly apply to this character of property, they were not intended to change the rule as declared in *Alvord v. Hendrie*, though they had been added to the statute by way of amendment since the decision in this case.

The rule declared in these cases was evidently had in mind by the person who prepared the notices involved in this case. The plaintiff and each of his assignors claimed a lien upon the mill and the claims upon which it is situated; that is, upon the Clara Jurgens, Placer Lot No. 42, and the Central Lode. One of the notices does not mention specifically the Central Lode, but, as already stated, this claim falls entirely within the boundaries of Placer Lot No. 42, and in our opinion the description of the latter is sufficient to indicate the area within which the work was done, though this claim is not specifically mentioned. Evidently, also, there was had in mind at the time the notices were prepared the idea that, since the work was done for the

exploitation of a group of contiguous claims, it was proper to treat them as constituting a single consolidated claim. This theory, we think, is correct. It is frequently the case that a group of contiguous claims is treated as a single one, and work is done upon one for the benefit of all. If such work is reasonably adapted to the development of all the claims and tends in any measure to accomplish this object, it is considered as annual representation work for all of the claims (*Copper Mt. Min. Co. v. Butte & Corbin C. & S. Min. Co.*, 39 Mont. 487, 104 Pac. 540), and all of them may be patented as a single claim. If this theory is legitimate for the purpose of developing and patenting mining claims, we see no good reason why lien claimants may not proceed upon the same theory in making their claims. There is nothing in the statute, *supra*, prohibiting it, and it is entirely consonant with the correct notion of what constitutes a mining claim.

Here the purpose had in view by Spaulding, Breen and MacGinniss was the exploitation and sampling of the entire group of claims. All the work done, including the erection of the mill, was with that end in view. The mill was apparently intended to be a permanent structure, and to become a part of the unit property, made up of the entire group. The workmen were all employed upon the enterprise, whether in construction work as such, or in repairs and alterations, or in mining work, or in building roads, or in cutting cordwood. The entire group constitutes a consolidated claim, and the work of the whole enterprise was expended upon it. The statute does not mention repairs and alterations; yet it takes labor to accomplish them. Touching the labor expended in building roads and preparing fuel belonging to the owner for use in producing power to carry on his enterprise, it may be said it is as much labor done on the claim as is that expended in the use of a pick or hammer and drill in the workings of the mine above or below ground. The same may be said of operatives in the mill whose duty requires them to keep the machinery in order and to clear away debris which accumulates from time

to time in and about the buildings erected to house the machinery. It is true that it was held by this court, in *McGlaulin v. Wormser*, 28 Mont. 177, 72 Pac. 428, that one must look to the statute for the right to claim a lien for labor done or materials furnished, and that no such right exists unless specific provision is made for it. It was also held in *Holter Hardware Co. v. Ontario Min. Co.*, 24 Mont. 198, 81 Am. St. Rep. 421, 61 Pac. 8, 20 Morr. Min. Rep. 518, that one furnishing fuel or lubricating oil to a mining company has no lien for the price of it, because lubricating oil and fuel are consumed in the use, and do not become a part of the property of the owner. Neither of these cases furnishes, even by implication, support for the conclusion that one employed by a mine owner to do work upon his property in connection with his enterprise, without which it cannot proceed, has not a lien upon the property to secure the price of his work. The statute does not require the character of the work done to be classified or even the items of it to be set out in the account filed with the notice. All that is required is a just and true account—an honest statement—from which may be understood what amount is claimed. (Revised Codes, sec. 7291; *Black v. Appolonio*, 1 Mont. 342; *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; *Smith v. Sherman Min. Co.*, *supra*.)

It is argued in this connection that, since the evidence shows that a portion of the work done by some of the men was done upon the Mabel Beal claim and others in the group not included among those described in the notices, and the value of this portion of the work cannot be definitely ascertained, all lien claims affected by this condition should have been excluded. This argument is fully answered by the statement that the plaintiff and each of his assignors was entitled to a lien upon the entire group, including the seven claims, and that the defendant cannot complain that they claimed less than they were entitled to and asserted their right as to only three claims of the group. If they had a right of lien upon the whole group, they had the same right as to each claim constituting the group. The work done, whether upon one or the other of

the claims, affected each claim. Therefore it seems unreasonable to say that, because they failed to assert as extensive a right as they really had, they lost their right altogether.

3. The foregoing discussion disposes of the contention that the court erred in rendering judgment for plaintiff. The evidence fully establishes the fact that the work was done at the instance of Spaulding and MacGinniss, and that they are personally liable for the amounts claimed to be due. Whether they were technically partners or not, the work was done at their instance and in part paid for by them. Neither the company nor the bank had any connection with the employment of any of the men.

From the facts detailed in the statement heretofore made, it is apparent that some of the lien claimants were engaged in construction work upon the mill exclusively. Those so engaged might have proceeded upon the theory that Spaulding and MacGinniss were lessees, and claimed their liens against the mill only and enforced them by sale of it under the provisions of section 7294, *supra*. It might plausibly be argued that, since they did not pursue this course, but elected to treat the mill as a part of the realty, neither they nor the rest of the claimants who had no such right, because they did other kinds of work, ought to have ordered a sale of the mill as a whole as the judgment directs. The company, which is the owner of the other interest in the property, is the only person who could complain of this feature of the judgment. Since this is so, and since it did not appeal, we must presume that it is satisfied with the result. The judgment is clearly correct in ordering the sale of the MacGinniss interest in the realty, including his interest in the mill.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: I am unable to concur in that portion of the foregoing opinion which deals with labor performed upon the Mabel Beal claim.

STATE EX REL. ROSENSTEIN, RELATOR, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 2,843.)

(Submitted March 19, 1910. Decided April 4, 1910.)

[108 Pac. 580.]

Justices of the Peace Courts—Appeal—Notice—Contents—Jurisdiction—Prohibition.

Appeal—Statutory Requirements—Substantial Compliance.

1. Appeals are subject to statutory regulation, and in order to confer jurisdiction upon the appellate court there must be at least a substantial compliance with the statute.

Appeal—Justices' Courts—Notice—Contents.

2. The notice of appeal from a justice's court to the district court, required by section 7121, Revised Codes, must describe the particular judgment or order appealed from by reference to the court which rendered it, to the parties litigant, and to the date, and amount or character of it, in terms sufficiently specific to identify it, without resort to extrinsic evidence.

Same—Justices' Courts—Notice—Contents—Prohibition.

3. *Held*, on application for writ of prohibition that a notice of appeal from a justice's to the district court which did not state the nature and amount of the judgment complained of and gave the date of it as "the — day of September, 1909," failed to identify the judgment appealed from, and was therefore insufficient to give the district court jurisdiction.

ORIGINAL APPLICATION for prohibition by the state, on the relation of H. D. Rosenstein, against the District Court in and for Silver Bow county and Jeremiah J. Lynch, judge thereof. Motion to quash the alternative writ denied, and a peremptory writ ordered to issue.

Messrs. Mackel & Meyer submitted a brief in behalf of Relator; *Mr. Alex. Mackel* argued the cause orally.

In behalf of Respondents, *Messrs. Veazey & Veazey* and *Mr. E. L. Bishop* submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Original application for writ of prohibition. On September 13, 1909, the relator brought his action in a justice's court in Silver Bow county to recover of the Great Northern Railway Company damages in the sum of \$299. The railway company appeared to defend the action, and thereupon, after a trial, on October 5, judgment was rendered and entered in favor of the relator for the amount demanded and for costs, taxed at nine dollars. The railway company, desiring to appeal to the district court, caused to be filed with the justice, and served upon the relator, the following notice:

"In the Justice's Court of Silver Bow County.

"Before HENRY FOLEY, Justice of the Peace.

"H. D. ROSENSTEIN, Plaintiff,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

'NOTICE OF APPEAL.

"The State of Montana,
County of Silver Bow,—ss.

"You wil' please take notice that the defendant in the above-entitled action hereby appeals to the district court of the second judicial district in and for the county of Silver Bow from the judgment therein made and entered in the said justice's court on the — day of September, 1909, in favor of said plaintiff and against said defendant and from the whole thereof.

"Dated October 5, 1909."

On October 8 the justice transmitted to the clerk of the district court a copy of his docket, together with the papers filed in the action, and they were filed with the clerk in his office on that day. Thereupon the relator, appearing specially and for that purpose only, moved the court to dismiss the appeal, on the ground of insufficiency of the notice to give the court juris-

diction. The motion having been denied, this proceeding was instituted to restrain the court from proceeding to trial and judgment. The respondents have moved to quash the alternative writ and dismiss the proceeding on the ground that the facts stated in the affidavit do not warrant the relief sought. The application is submitted for determination upon the one question, to-wit: Is the notice of appeal, which incorrectly states the date of the judgment and wholly fails to designate the amount of it or describe it otherwise than by naming the court and the parties, sufficient to confer jurisdiction upon the appellate court?

Appeals from justices' courts to the district courts are allowed in all cases in such manner and under such regulations as may be prescribed by law. (Constitution, Art. VIII, sec. 23.) Section 7121, Revised Codes, provides: "The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney." The provision touching appeals from the district courts to the supreme court is substantially the same. (Revised Codes, sec. 7100.) It will be noted that these provisions are silent as to the contents or form of the notice required; so that, while appeals are subject to statutory regulation, with which there must be at least a substantial compliance in order to confer jurisdiction upon the appellate court (*Territory v. Hanna*, 5 Mont. 246, 5 Pac. 250; *State v. Northrup*, 13 Mont. 522, 35 Pac. 228; *State v. Malish*, 15 Mont. 506, 39 Pac. 739; *Hines v. Carl*, 22 Mont. 501, 57 Pac. 88; *Creek v. Bozeman Water Works*, 22 Mont. 327, 56 Pac. 362), we must consider what the office of the notice is, and by resort to general rules of law ascertain what the contents of it must be. The first purpose of it is to clothe the appellate court with jurisdiction of the cause for trial or for review, as the case may be; for the appeal is taken by filing and serving the notice, though it is ineffectual for any purpose unless the required undertaking be filed. (Revised Codes, sec. 7124.) The second purpose of it is to convey information to the adverse party that the appellant has removed the cause to the appel-

late court, so that he may have his day in that court to maintain his rights. It seems obvious, therefore, that, to afford him the opportunity to appear, he must be informed of the particular judgment or order from which the appeal is taken, so that he may understand what he is required to meet. This requires that the judgment or order be described by reference to the court which rendered it, to the parties litigant, and to the date and amount or character of it, in terms sufficiently specific to identify it. In other words, the notice performs the office of a summons. In *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. 204, it was held that the judgment must be specifically referred to. So in *Steuffen v. Jefferis*, 9 Mont. 66, 22 Pac. 152, it was said: "The order denying a motion for a new trial is one from which an appeal may be taken directly; but a litigant, wishing to appeal from such order, must give notice thereof, and his notice of appeal must direct the attention of the adverse party to the fact that such order will be the subject of review in the appellate court." In the case of *Hall v. Butte Electric Ry. Co.*, 39 Mont. 144, 101 Pac. 965, this court dismissed an appeal because the notice recited a judgment against three defendants, whereas the judgment found in the record was against one defendant only.

The general rule is thus stated in 24 Cyc. 689: "A notice of appeal, to be effective, must properly designate the judgment appealed from by a sufficient description to show the applicability of the notice to the judgment, without resort to extrinsic evidence. But the object of a notice of appeal is accomplished when the appellate court can ascertain from an inspection of the notice what particular judgment the appellant complains of." Applying this rule to the notice before us, we find that it does not describe the judgment complained of, either by stating the nature or amount of it, or by giving the date of it. It omits the first particular of the description entirely, and states the date in such a way as to make it applicable to any judgment which may have been rendered and entered at any time within thirty-five days prior to the date at which the judg-

ment complained of was actually rendered. It cannot, therefore, be ascertained from an inspection of the notice and without resort to extrinsic evidence whether the judgment referred to is the one shown by the copy of the docket of the justice filed in the district court, or whether reference is made to another, rendered between the same parties at any time within thirty-five days prior to its date. It wholly fails to identify the judgment. It is therefore insufficient.

Counsel cite many cases in support of their respective contentions in which particular forms of notice are considered. They are in irreconcilable conflict. Some of the courts, as in Oregon, Wisconsin and Minnesota, hold to the rule of strict construction. (*Beck v. Thompson*, 35 Or. 182, 76 Am. St. Rep. 471, 57 Pac. 419; *Atkinson v. Chicago & N. W. R. Co.*, 69 Wis. 362, 34 N. W. 63; *Pettingill v. Donnelly*, 27 Minn. 332, 7 N. W. 360.) Others, as in Washington, Nevada and Iowa, have apparently adopted the rule that extrinsic evidence may be resorted to to supplement and aid the recitals in the notice. (*Horrell v. California etc. Assn.*, 40 Wash. 531, 82 Pac. 889; *Paul v. Cragnaz*, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983, 47 L. R. A. 540; *Kennedy v. Rosier*, 71 Iowa, 671, 33 N. W. 227.) While we should go far to sustain an appeal when the notice could by any reasonable construction be held to refer to the particular judgment or order, we are not inclined to sustain one where the notice does not furnish the information required, without supplement by reference to extrinsic evidence. The appeal should have been dismissed.

The motion to quash the alternative writ is denied. A peremptory writ is ordered issued as prayed for.

Writ granted.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied May 2, 1910.

DOLENTY, APPELLANT, v. ROCKY MOUNTAIN BELL
TELEPHONE CO., RESPONDENT.

(No. 2,806.)

(Submitted April 4, 1910. Decided April 18, 1910.)

[108 Pac. 912.]

Garnishment—Payment of Claims by Garnishee—Delay—Unauthorized Payment—Uncertainty of Amount of Debt—Liability of Garnishee—Counterclaim—Pleading.

Garnishment—Rights of Garnishee—Payment of Claims.

1. Where the buyer of certain property had, as per agreement between the parties, retained a part of the purchase price with which to pay outstanding liens, and did pay full value for certain of the claims, it was subsequently, when sued as garnishee, properly given credit for the full amount of such claims, though the claimants received only a portion of the sums due, the evidence being silent as to who received the balance.

Same—Payment of Claims by Garnishee—Delay.

2. The garnishee mentioned in the foregoing paragraph, having permitted a judgment foreclosing one of the liens which it had agreed to pay out of the purchase money retained by it, to remain unpaid for nearly a year after rendition, was only entitled to credit for the amount of the judgment, and not to the costs, expenses and interest due to delay in paying the claim; if it had any excuse for not making payment before, the burden was upon it to show that it was entitled to credit in a greater amount.

Same—Pleadings—Counterclaim.

3. In a suit against a garnishee by the attaching creditor, the former cannot assert a counterclaim under a general denial of indebtedness; to make it available, such counterclaim must be specially pleaded.

Same—Pleading—Bill of Particulars.

4. The furnishing of a bill of particulars in which a garnishee had listed a claim as a setoff against the attaching creditor's demand did not constitute a pleading of a counterclaim.

Same—Unauthorized Payment of Claims by Garnishee.

5. At the time of the sale of a telegraph and telephone plant the parties stipulated that the sum of \$20,000 should be deposited in a bank, said sum to be by the bank applied to the payment of the seller's outstanding bonds, the latter to pay all expenses incident to their redemption. It was also provided that the buyer should retain a certain amount of the purchase price for the purpose of paying off a number of liens on the property. *Held*, in a suit by an attaching creditor against the buyer, as garnishee, that the garnishee was not entitled to an allowance for expenses in discharging the bonds, but that the authority to pay the \$20,000 for the purpose indicated was an implied prohibition against the expenditure of any greater amount.

Same.

6. Evidence *held* insufficient to support a finding that under a parol agreement, made immediately subsequent to the contract relative to

the payment of outstanding liens (mentioned in the above paragraphs), the garnishee was entitled to credit for amounts paid in satisfaction of claims which were not liens against the property bought by it.

Same—Uncertainty of Amount of Debt.

7. While a garnishee is not chargeable on a contingent liability or a conditional contract merely, he may be held if his liability is certain, and the only uncertainty which exists is as to the amount thereof.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by W. B. Dolenty against the Rocky Mountain Bell Telephone Company. Judgment for defendant, and plaintiff appeals from it and an order denying a new trial. Reversed and remanded.

Messrs. Walsh & Nolan, and Messrs. Miller & O'Connor, submitted a brief in behalf of Appellant. Mr. T. J. Walsh argued the cause orally.

It is conceded that an obligation cannot be garnished until it has accrued; the profits to arise under a contract not yet performed are not subject to garnishment. But when the contract is completed, when everything required to be done to entitle the obligee to his money has been done, but by agreement the payment is simply deferred, the amount owing is subject to levy. If one hires out by the month, his wages for the month are not subject to garnishment until he has earned them; but when he has earned them, they are so subject, even though by express agreement or through custom pay-day has not yet arrived and the amount is not, accordingly, due when the levy is made. (*Telles v. Lynde*, 47 Fed. 912; *Cross v. Brown*, 19 R. I. 220, 33 Atl. 147; 14 Am. & Eng. Ency. of Law, 758; *Cowell v. May*, 26 Mont. 163, 66 Pac. 843.)

The statute (Revised Codes, sec. 6667) in no manner intimates that the debt must be "due"; the liability attaches if the debt is "owing." Although the former term is exceedingly elastic in meaning, signifying sometimes, perhaps usually, presently payable, the latter term characterizes all accrued obliga-

tions whether presently payable or payable in the future. (10 Am. & Eng. Ency. of Law, 277.) The difference in the meaning of these two words, when there is a difference, was pointed out by Justice Story in the opinion in *United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308, considering a statute giving, in the distribution of estates, a priority to any "debt due to the United States." The court held the word "due" in the statute under consideration synonymous with "owing." The term "owing" applies as well to unmatured as to matured claims. (*Coquard v. Bank of Kansas City*, 12 Mo. App. 261; *Musselman v. Wise*, 84 Ind. 248.) And so "a debt is no less a debt because it has not yet matured, if it will certainly become payable in the future." (9 Am. & Eng. Ency. of Law, 977; *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.) The rule that debts "owing" though not "due" are subject to garnishment is asserted in the following recent cases: *Smith v. Marker*, 154 Fed. 838, 85 C. C. A. 372; *Marble Falls v. Spitler*, 7 Tex. Civ. App. 82, 25 S. W. 985; *Lancashire Ins. Co. v. Corbett*, 62 Ill. App. 236. If the amount owing is susceptible of ascertainment by some standard referable to the contract itself, it becomes sufficiently certain to be reached by garnishment. (14 Am. & Eng. Ency. of Law, 764, 769; *Jaques v. Carstarphen W. Co.*, 131 Ga. 1, 62 S. E. 82; *Cutter v. Perkins*, 47 Me. 557; *Thorndike v. De Wolfe*, 6 Pick. 120; *Downer v. Topliff*, 19 Vt. 399.)

In behalf of Respondent, there was a brief by *Messrs. McIntire & McIntire*, and oral argument by *Mr. H. G. McIntire*.

When one is sued as garnishee, the plaintiff, in the absence of fraud, has no greater rights than his debtor, and is subject to the same defenses that might be interposed by such garnishee had a suit been begun against him by his creditor. In other words, the garnishing or attaching creditor stands in the shoes of his debtor. (*Board etc. School Dist. No. 1 v. Whalen*, 17 Mont. 1, 41 Pac. 849; *Waples on Garnishment*, p.

209; *Walling v. Miller*, 15 Cal. 38, 7 Morr. Min. Rep. 165; *Aultman v. McConnell*, 34 Fed. 724.) And where chattels are sold, and the purchaser agrees to pay the balance of the consideration after the claims of third persons against the seller have been settled, he is not liable, in garnishment proceedings, to a creditor of the seller until the amount of such claims is ascertainable. (*Durling v. Peck*, 41 Minn. 317, 43 N. W. 65; *Mundt v. Shabow*, 120 Wis. 303, 97 N. W. 897; see, also, Drake on Attachments, 6th ed., secs. 517 *et seq.*, and secs. 593 *et seq.*; *Oppenheimer v. Bank*, 20 Mont. 192, 50 Pac. 419.) Whatever defense a garnishee could urge against an action by defendant for the debt in respect to which he is garnished, he may set up in bar of judgment against him as garnishee. (Drake on Attachments, 6th ed., sec. 672; *Rock Island Lumber Co. v. Trust Co.*, 54 Kan. 124, 37 Pac. 983; see, also, *Cowell v. May*, 26 Mont. 163, 66 Pac. 843.) Since, to render one liable to garnishment, his indebtedness must be due as a money demand, unaffected by liens or prior encumbrances or conditions of contract, one holding property as an indemnity for his conditional liability, whether by mortgage or pledge, is not subject to garnishment. (*Zeltman v. Bank*, 67 Mo. App. 672; *Tabor v. Bank*, 35 Colo. 1, 83 Pac. 1060, and cases cited.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On June 14, 1905, this plaintiff commenced an action in the district court of Park county against the Yellowstone Park Telephone and Telegraph Company (hereinafter referred to as the Park Company), and Frank A. Hall, to recover \$4,982, with attorney's fees and costs, on a contract for the direct payment of money. A writ of attachment was issued, and on June 26 served upon the Rocky Mountain Bell Telephone Company (hereafter referred to as the Bell Company), as garnishee. Such further proceedings were had in the action that on February 8, 1906, a judgment in favor of plaintiff and

against the Park Company and Hall was duly given and made for \$8,405.26 and costs. Upon this judgment execution was issued and placed in the hands of the sheriff of Park county, who thereupon demanded of the Bell Company that it pay over to him all sums of money owing by it to the Park Company or Hall. The Bell Company having failed and refused to pay over any sum, this action was brought by the judgment plaintiff against the Bell Company as garnishee. The complaint in this action, after setting forth the foregoing facts, which are admitted to be true, further alleges that, at all the times since the commencement of the action of Dolenty against the Park Company and Hall, the Bell Company has been indebted to the Park Company in the sum of \$5,000, for which amount judgment is demanded. The amended answer denies any indebtedness to the Park Company, and alleges that, prior to the levy of the writ of attachment, the Bell Company had purchased from the Park Company certain property, and that the parties agreed that the Bell Company should pay \$20,000 of the purchase price in the discharge of a certain mortgage then upon the property purchased, and that the further sum of \$5,000 should be withheld by the Bell Company to be applied by it to the payment of certain other debts and liabilities of the Park Company, not including the claim of this plaintiff, and that such debts and liabilities exceed the sum of \$5,000. These affirmative allegations were put in issue by reply. The cause was tried to the court without a jury. Findings of fact and conclusions of law were made, and judgment entered in favor of the defendant, from which judgment, and an order denying him a new trial, plaintiff appealed.

There is not any conflict in the evidence. Before trial the plaintiff demanded a bill of particulars which would show the debts and liabilities of the Park Company, to pay which the \$5,000 was withheld by the defendant. In compliance with this demand, a bill of particulars was furnished, the items of which are as follows:

1.	Lien Claim of Bronson	\$ 182 45
2.	“ “ “ Cory	139 00
3.	“ “ “ Miller	150 00
4.	“ “ “ Montana Electric Company.....	2,109 40
5.	“ “ “ Enoch	82 50
6.	“ “ “ Ludwigson	207 50
7.	“ “ “ Montana L. & Mfg. Company.....	479 72
8.	“ “ “ Rickman	23 90
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9.	Claim of Rocky Mt. Bell Tel. Co.....	394 71
10.	Expense redeeming Bonds.....	587 36
11.	Claim of Chicago Tel. Co.....	543 44
12.	“ “ John Walsh	56 65
13.	“ “ Thompson Falls Merc. Co.....	459 00
14.	“ “ Ludwigson	101 70
15.	“ “ Miles	46 25
16.	“ “ Turners	34 65
17.	“ “ Fransham	51 00
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Total		\$5,649 23

The evidence discloses that on June 23, 1905, the Bell Company purchased from the Park Company certain telephone and telegraph lines, and the instruments, easements and fixtures used in connection therewith, for the sum of \$25,000; and at the same time the parties entered into a contract in writing, by the terms of which it was agreed that \$20,000 of the purchase price should be deposited with the American Trust and Savings Bank, of Chicago, to be by that bank applied to the payment of certain bonds of the Park Company, then outstanding and secured by trust deed or mortgage. The Park Company agreed to have the trust deed or mortgage satisfied of record, and “to pay all costs and charges by way of premiums or otherwise of redeeming said outstanding bonds and satisfying said mortgage.” The contract further provides: “The balance of said purchase price, to-wit, \$5,000.00 shall be paid by the party of the second part [Bell Company] and by it ap-

plied to the payment of any and all liens, claims, or judgments which are or may be encumbrances upon the property herein agreed to be sold, and if, after all said liens, claims or judgments shall have been paid, there shall remain any balance of said sum of \$5,000, the party of the second part agrees to pay such balance to the party of the first part [Park Company]. It is the purpose, spirit, and intention of the parties hereto by these presents that the property hereinabove mentioned is to be sold and delivered by the party of the first part to the party of the second part for the said sum of \$25,000.00, free and clear of all liens, charges, and encumbrances." Provision is then made for an indemnity bond, and for the transfer of the immediate possession of the property to the Bell Company, and these last provisions were carried into effect.

The defendant having admitted the possession of the \$5,000, the plaintiff, to make out a *prima facie* case, introduced evidence showing the claims outstanding against the Park Company which were encumbrances upon the property, and that but \$50 had been paid in satisfaction of the Bronson claim, and but \$70 in satisfaction of the Enoch claim, and rested. The defendants then introduced evidence showing: That it had paid full value in satisfaction of the Bronson and Enoch claims, and that it had paid \$2,109.40 in satisfaction of the claim of the Montana Electric Company; that it had paid \$461.40 as expenses incident to the discharge of the outstanding bonds of the Park Company; that it had retained \$394.71 in satisfaction of a claim which it had against the Park Company; and further that in July, 1905, Frank A. Hall, president of the Park Company, had authorized it to pay out of the \$5,000 the following claims: Chicago Telephone Company, John Walsh, Thompson Falls Mercantile Company, A. Ludwigson, A. W. Miles, Pauline and Lillian Turner, and W. J. Fransham, and that the balance of the \$5,000 was retained by it to discharge these claims, or so much thereof as such balance would pay.

The trial court found that the claims which were encumbrances against the property aggregated \$3,374.47; that the

claim of the defendant company for \$394.71 was a valid setoff; and that, to pay the outstanding bonds of the Park Company, the Bell Company was compelled to incur an additional expense of \$461.41; and that this last-mentioned sum and the aggregate amount of the lien claims were covered by the written contract of June 23. In its finding No. 8 the court found that by an agreement between the Park Company and the Bell Company it was further provided that the Park Company should furnish to the Bell Company a list of other claims then owing by the Park Company, which should also be paid out of this \$5,000, and that such list was furnished, the claims therein scheduled amounting to \$1,504.80, and of these the claims of the Chicago Telephone Company, Ludwigson, Thompson Falls Mercantile Company, the Turners, and Fransham were intended to be paid "under and by virtue of said contract of June 23, 1905"; and that, after paying the first ten claims mentioned in the bill of particulars, the Bell Company should pay the claims listed by Hall in July, 1905, as shown above; and finally the court found that the Bell Company was not indebted to the Park Company at the time of the levy of the writ of attachment, or thereafter, in any amount whatever. From these findings the court concluded that the defendant company was not liable to plaintiff, and rendered and entered judgment in its behalf.

1. The claims scheduled in the bill of particulars fall into two groups; the first eight claims comprising the first group. Every claim of that group was a lien upon the property for some amount, and of those claims only three are contested by plaintiff. It is contended that the claim of Bronson was discharged for \$50, and the claim of Enoch for \$70, and such appears to be the fact; that is to say, Bronson received only \$50 for his claim, and Enoch only \$70 for his. But it does satisfactorily appear that the Bell Company was compelled to pay full value for each. Someone profited by the transaction, but the record is so meager that we are unable to determine the real facts; and, since the defendant company parted with its

money in order to release the property from these liens, we think it should be given credit for the full amount paid by it on each of these two claims.

Claim No. 4, of the first group, presents some complications. On October 1, 1904, the Montana Electric Company filed its claim against the property of the Park Company for \$1,463.80. On May 4, 1905, it commenced a suit to foreclose, claiming the principal sum with interest, costs and attorney's fees for foreclosure. On July 18, 1905, it recovered judgment for \$1,585, together with costs, taxed at \$28, and an attorney's fee of \$300, a total of \$1,913. Upon this judgment execution or order of sale was issued, and the property of the Park Company sold to the Montana Electric Company for \$1,977.54. On May 5, 1906, the Bell Company satisfied this judgment by the payment of \$2,109.40. With respect to the payment of this claim, P. R. Ferguson, the auditor of the Bell Company and a witness in its behalf, testified: "I do not know why we did not pay that judgment as soon as it was entered. I do not know why we allowed it to go into judgment at all and didn't pay it immediately after the 23d of June, 1905." This is the only evidence in the record touching the payment of this claim. When we recall that the Bell Company purchased the property from the Park Company on June 23, 1905, and retained the money to pay these claims, its delay in discharging this particular claim for nearly eleven months, during which time costs, expenses, and interest were permitted to accumulate, is wholly inexcusable. To permit it now to be credited with the \$2,109.40 which it paid for the redemption of this claim, in May, 1906, in the absence of any excuse whatever for the delay, would be tantamount to saying that it might have deferred payment of all of these lien claims until by the accumulation of costs and expenses they consumed the entire \$5,000. But that was not the intention of the parties to the contract, and as against the claim of an attachment creditor it could not be done. The pendency of this action was not any excuse for the delay. The Bell Company was obligated to pay the lien claims, of which

this was one. There is not anything in the record that would justify a court in crediting the Bell Company with more than the face of the judgment, \$1,913.

In the brief of respondent it is suggested that the appellant did not prove that the entire \$2,109.40 was not properly allowed; but, as we said above, the plaintiff made out his *prima facie* case by the admission of the defendant that it had the \$5,000 in its possession and by showing the amount of the claims which were encumbrances on the property; and as to this particular claim he showed the amount of it and that foreclosure suit had been brought; in other words, that an amount substantially the same as the face of the judgment was necessary to discharge it. Having made this showing, it is not imposing any hardship upon the defendant to require it to assume the burden of showing that it was entitled to credit in a greater amount, since the facts constituting its excuse for the delay in making payment were peculiarly within its own knowledge. Under the evidence the defendant is entitled to credit for each claim of the first group as returned in the bill of particulars, except that the claim of the Montana Electric Company should be limited to \$1,913, the amount of the judgment.

2. The second group embraces the remaining nine claims, listed in the bill of particulars. The first of these is the claim of this defendant, for \$394.71. This was for telephone services furnished by the Bell Company to the Park Company, and was not a lienable claim. It was not reduced to judgment prior to the date of the levy of the writ and was not an encumbrance upon the property of the Park Company. But it is insisted that it constitutes a valid setoff against a claim by the Park Company for the balance of the \$5,000, and, since the plaintiff as attaching creditor virtually stepped into the shoes of the Park Company, it can be asserted against this plaintiff. A setoff, as such, is not recognized by our Codes, and this is an action at law. It is true, as against a claim of the Park Company, this defendant could have asserted its demand as a counterclaim, if it had pleaded it; otherwise it could

not have done so. This is elementary. The amended answer in this action denies generally any indebtedness by the Bell Company to the Park Company at the time of the service of the writ of attachment, or subsequently, but does not set forth any counter-demand and ask to be permitted to retain a sum sufficient to discharge it. It cannot be disputed that any defense which the Bell Company could interpose as against an action by the Park Company for the balance of the \$5,000 it can now interpose as garnishee in an action by the attaching creditor (30 Cyc. 1073); but the rule which requires it to plead a counterclaim as against the Park Company likewise requires it to plead such counterclaim in an action against it as garnishee, at the suit of the attaching creditor, and it cannot assert such counterclaim under a general denial of indebtedness. (9 Ency. of Pl. & Pr. 835, and note; 14 Am. & Eng. Ency. of Law, 2d ed., 845, and note; 20 Cyc. 1007, and note; *Kling v. Tunstall*, 109 Ala. 608, 19 South. 907.) Furnishing a bill of particulars in which this claim is listed is not pleading a counterclaim within the meaning of section 6540, Revised Codes. In finding that this claim was a valid setoff in favor of the Bell Company, in the absence of any pleading asserting it, and in the absence of any directions to the Bell Company, given prior to the levy of the writ to pay such claim, the trial court erred.

The next item in the second group is one for \$587.36, and this was reduced upon the trial to \$461.41, for expenses incurred in discharging the outstanding bonds of the Park Company. It will be remembered that by the terms of the written contract of June 23, \$20,000 of the purchase price was to be deposited with the American Trust and Savings Bank, to be by the bank applied to the payment of those bonds, and that the Park Company agreed to pay all costs and charges of redeeming the bonds. The authority of the Bell Company to pay \$20,000 toward the discharge of those bonds is at least an implied prohibition against the expenditure of any greater amount, and we are not informed by what authority the Bell Company assumed to increase its liability. If the contract had

provided that the Bell Company should pay off the bonds, then it would have had authority to use such sum as was necessary for that purpose; but that is not the contract. The Bell Company may have a valid claim against the Park Company for this additional outlay; but this record not only fails to disclose any authority for asserting it against the attaching creditor, but does show a want of such authority. The Bell Company was limited by the contract to the expenditure of \$20,000 for that single purpose; and since it was not authorized, prior to the levy, to make such additional expenditure, finding No. 5 made by the trial court is erroneous as to the excess over \$20,000 expended in redeeming those bonds.

The other claims in this second group may be considered together. There is not a word of evidence to indicate whether any of these claims were or might become lienable. The witness Ferguson, the only one who testified in regard to them, did not know anything as to their character. If the claim of the Chicago Telephone Company was ever a lienable claim, the evidence affirmatively shows that a lien for it has never been filed, and that the time for filing a lien had expired long prior to the date of the levy of the writ of attachment. There is not any evidence that any of these claims were for materials which went into the property of the Park Company or for labor done upon its property, nor is there any evidence to show when any of such claims matured; and therefore finding No. 10, made by the trial court, that the claim "of the Chicago Telephone Company for \$477.15, Anton Ludwigson for \$101.70, the Thompson Falls Mercantile Company for \$459, Pauline and Lillian Turner for \$34.65, and W. J. Fransham for \$51, aggregating \$1,123.50, were for materials furnished to and work done for said Yellowstone Park Telephone and Telegraph Company, and were referred to and intended by said last-named company under and by virtue of said contract of June 23, 1905, to be paid out of the aforesaid price of its said property, in addition to the liens, encumbrances and mortgages hereinbefore referred to in so far as the purchase price for its said property would

pay the same," has not any support in the evidence whatever, if the reference is to the written contract of June 23, 1905.

But it is insisted that all of the claims of this second group, excepting claims Nos. 9 and 10 above, were properly allowed under a parol agreement of June 23, 1905, made subsequently to the execution of the written contract. The written agreement provides for the payment, out of this \$5,000, of claims which were or might become encumbrances upon the property. It is now urged that under this parol agreement such other claims were to be paid as might be embraced in a schedule then agreed to be furnished by Hall, the president of the Park Company. The evidence touching this alleged parol agreement is submitted in full:

"H. L. Burdick, being recalled for further examination, testified as follows: [Direct examination.] I was present when this contract between the two companies and Mr. Hall was signed. Mr. S. H. McIntire was also present. Q. Now, was there anything said about what claims were outstanding against the Yellowstone Telegraph Company after the making of the contract? A. I inquired of Mr. Hall, after he had signed the contract, if he was quite sure that the amount of claims outstanding would not exceed \$5,000. Mr. Hall stated that he did not at that time know, but would submit to us a list of claims which could be paid as against the Yellowstone Park Telephone and Telegraph Company. He submitted such a list as that to Salt Lake, not to me. Q. Do you know whether or not the list submitted by him is the list that is contained in the bill of particulars attached to the answer in this case? You know the bill of particulars, you can look at it. A. A good deal of the correspondence was sent to me with reference to these claims. The liens were submitted by me to Salt Lake. They were first handed to me. I can designate on that bill of particulars what claims I discovered myself to be against the property, and that Mr. Hall sent on to me. The claims submitted by Mr. Hall to me were Harry Bronson, C. L. Cory, Lew Miller, Montana Lumber and Manufacturing Company,

Montana Electric Company, J. C. Enoch, Anton Ludwigson, and C. C. Rickman. [Cross-examination.] It seems quite evident from the contract which I made that I was a little apprehensive, even before the contract was signed, that the claims might amount to more than \$5,000; and I practically protected myself against such deficiency as that by requiring and obligating them to put up a bond to the amount of \$10,000, to the effect that it should not be more than that. Mr. Wallace, the president of the company, instructed me to find out as far as I could what liens lay against the Yellowstone Park Telephone and Telegraph Company. That was before the contract was signed. I started the procedure, but was not satisfied that we had found everything that might lie against the company. Therefore we had some discussion as to whether we were free and clear as to the amount. So as to be sure to be protected in the matter, we put this clause in the contract requiring a bond that there should not be more than \$5,000. We asked Mr. Hall to submit to us a list of claims that in his knowledge lay against the company. I found the lien of Harry Bronson, Cory, Montana Electric Company, Lew Miller, J. C. Enoch, Anton Ludwigson, on file, and I believe, the Montana Lumber and Manufacturing Company was also on file. Mr. Hall really did not submit any claims to me personally. There were some claims sent to me for submission to the Salt Lake office, by Mr. Hall to me; but I don't remember what claims they were. [Redirect examination.] I have designated the liens that were first submitted to me."

When we consider the subject matter of this conversation, the purpose to be accomplished, and the efforts that had already been put forth, it appears to us that there is not any room for a difference of opinion as to the effect of this evidence. The written agreement had just been executed. It provides for the payment of such claims as were or might become encumbrances upon the property then purchased. The contract in terms declares that it was the intention of the parties that the property should be turned over to the Bell Company free

from any encumbrances. Mr. Wallace, the president of the Bell Company, had instructed Burdick, who was local superintendent, to ascertain what claims were outstanding that were liens upon the property, and Burdick had made an effort to comply; but, not being fully satisfied, this discussion arose, resulting in Hall's agreement to furnish "a list of claims that in his knowledge lay against the company." Since it was wholly immaterial to the Bell Company what indebtedness the Park Company had aside from claims which were or might become encumbrances upon the property, it is impossible to suppose that any indebtedness other than such lienable claims was ever in contemplation of the parties when this conversation was had. The record discloses that the Bell Company has not paid these additional nonlienable claims, and it cannot have any interest in paying them. As to any balance of the \$5,000 it is the mere trustee, and as to the final disposition of the balance it cannot have any interest. In view of the fact that a written agreement had just been executed, which fully sets forth the intention of the parties, it seems altogether unreasonable that the parties would proceed immediately to enter into a parol agreement which would have the effect of enlarging the scope of the written contract, and that such parol contract should be called into existence at the instance, not of Hall, who might have had some interest in seeing these nonlienable claims paid, but of the Bell Company, which was not interested in them to any extent whatever. We are thoroughly convinced that Burdick desired a list of lienable claims, such claims as Mr. Wallace had directed him to investigate, and that Hall's agreement to furnish a list of claims which lay against the company was intended to and did refer to the very claims with regard to which Mr. Wallace was solicitous; and the fact that in July following Hall approved these other claims, and directed the Bell Company to pay them, cannot be invoked to the prejudice of this plaintiff, whose rights attached as of the date of the levy of the writ. The evidence fails to support finding No. 8 made by the trial court, and fails to

justify the court in holding that the Bell Company was entitled to be credited with any of the claims comprising this second group, referred to above.

But there is a suggestion found in the brief of respondent, that, at the date of the levy of the writ, the \$5,000 was retained to meet the payment of outstanding claims against the Park Company, and, until the amount of such claims was determined, the Bell Company did not owe to the Park Company anything whatever; in other words, that the Bell Company's liability was then so far contingent that it was not subject to garnishment; and *Cowell v. May*, 26 Mont. 163, 66 Pac. 843, is cited, and the following quoted from the opinion: "Although the immaturity of a debt at the time of garnishment is, of itself, unimportant in so far as the ultimate liability of the garnishee is concerned, yet, in order to charge him, there must be an existing debt at the time of the service—a contract under which a debt may or may not arise is not sufficient. There must be at the time of the service a debt due or to become due, and not a contingent liability or a conditional contract merely." And this is followed by a quotation from section 551, Drake on Attachment. That this is a correct statement of the rule is evidenced by the authorities generally; but if the liability of the garnishee is certain, and the only uncertainty which exists is as to the amount of such liability, then the debt, whatever it may be, is subject to attachment. This is the meaning of section 6667 of the Revised Codes, and is the rule recognized by the authorities. (20 Cyc. 1008, and note; 14 Am. & Eng. Ency. of Law, 2d ed., 769; 2 Wade on Attachment, sec. 450; *Webster Wagon Co. v. Peterson*, 27 W. Va. 314; *Miller v. Scoville*, 35 Ill. App. 385; *Downer v. Topliff*, 19 Vt. 399.) In 2 Shinn on Attachment and Garnishment, section 481g, it is said: "The contingency which will prevent the property or debt from being attached must be such a contingency as affects the property or debt itself, and not simply one which affects the liability of the garnishee to have the effects or credits taken from him in a particular manner. It must be such a con-

tingency as may preclude the principal from any right to call the garnishee to account." (*Dwinel v. Stone*, 30 Me. 384.)

There is not any difference in principle, and little, if any, in the facts, between the present action and the case of *New England Marine Ins. Co. v. Chandler & Burroughs*, 16 Mass. 275. In the latter case Chandler was indebted to the Union Bank and to other parties, including the insurance company. He transferred to Burroughs, as trustee, certain certificates of stock, with the understanding that Burroughs should sell the stock, pay the bank, and turn over any surplus to Chandler. Before the securities were sold, Burroughs was served with garnishment process in an action by the insurance company against Chandler. Burroughs answered setting forth the facts, from which it appeared that the value of the available assets in his hands exceeded Chandler's indebtedness to the bank, and the court properly held that, though the insurance company's case would have to be delayed until Burroughs could sell the securities and account for the surplus over the amount due the bank, such surplus, whatever it might be, was a garnishable debt. The Massachusetts case is cited with approval in *Cutter v. Perkins*, 47 Me. 557.

If in this present case the Bell Company had made answer to the garnishment immediately after service of the writ, it would have been compelled to set forth that it had in its hands, as trustee for the Park Company, \$5,000, out of which it was obligated to pay all claims against the Park Company which were then or might become encumbrances upon the property transferred by the agreement of June 23; that the amount of encumbrances then on the property was \$3,178.07; that there were the outstanding claims of Walsh, Thompson Falls Mercantile Company, Ludwigson, Miles, the Turners, and Fransham, aggregating \$749.25, which might or might not be lienable, dependent upon the character of the claims and the time when each matured. Such would have been a full and fair return by the garnishee, and it would have shown a substantial balance in its hands, which under the contract be-

longed to the Park Company. That amount was certain, and there was a further balance which might or might not be subject to garnishment, depending upon the result of an investigation of the claim last-mentioned, and, if such investigation had disclosed the nonlienable character of those claims, the entire balance over and above \$3,178.07 would have been subject to garnishment. Apparently the Bell Company did not make any answer to the garnishment until long after the time for filing liens for these claims just mentioned had expired, and no liens were filed, and, since the written contract of June 23 does not provide for the payment of these claims, the entire balance over and above the amount of the claims which were included in the contract of June 23 is subject to garnishment, even though at the date of the service of the writ the exact amount of such balance was not definitely fixed.

Since there is not any dispute as to the facts of this case, a new trial is not necessary; but the cause is remanded to the district court, with directions to set aside its findings and judgment, and enter judgment in favor of the plaintiff for \$1,821.93 and costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied May 18, 1910.

COLEMAN, RESPONDENT, v. NORTHERN PACIFIC RAILWAY CO., APPELLANT.

(No. 2,810.)

(Submitted April 5, 1910. Decided April 18, 1910.)

[108 Pac. 582.]

Notaries Public—Fees—Depositions.

1. A notary public who, in taking depositions, made use of a stenographer employed for that purpose by the party at whose instance they were being taken, and who merely swore the witnesses and attached his certificate to each deposition, was entitled only to the fees prescribed by statute for attaching his certificate and administering the oaths, and not to the additional sum of twenty cents per folio for transcribing the testimony allowed by section 3165, Revised Codes.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by John A. Coleman against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals from it and an order denying a new trial. Modified and affirmed.

Messrs. Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, submitted a brief in behalf of Appellant. Mr. Brown argued the cause orally.

No appearance for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges that between the fifteenth and twentieth days of December, 1908, the defendant engaged and employed the plaintiff as a notary public to take the depositions of certain witnesses in the case of Ethel Berry against the Northern Pacific Railway Company, then pending in the district court of Silver Bow county, which depositions were then and there taken before plaintiff, as notary public, at the instance and request of the defendant, "for which plaintiff was

entitled to the sum of \$61.80, fees as provided by the laws of Montana," and by reason of the premises defendant became indebted to plaintiff in the sum mentioned, for which judgment is demanded. The answer was a general denial.

The testimony shows that plaintiff was employed by John G. Brown, Esq., one of the attorneys for the defendant, to take the depositions; that he, as notary public, swore the witnesses; whereupon their testimony was taken in shorthand by one Frank Riley, a stenographer employed by the defendant. After the testimony was transcribed by Riley, plaintiff attached his certificate to each deposition as notary public. He made no objection to the employment of Riley, and the latter has been fully paid for his services by the defendant, at statutory rates, the plaintiff being notified of such payment. The district court of Silver Bow county held that, if Brown employed Riley, plaintiff was entitled to recover the full amount claimed, but that, if Riley was employed by the plaintiff then the latter was not entitled to recover. Plaintiff's position was that he was entitled to full compensation under the statute, regardless of whether he did the manual labor or not. He was not present during all of the time when the witnesses were testifying, but, as he says, he "supervised the whole thing." The district court directed a verdict in favor of the plaintiff for \$61.80, judgment was entered thereon, from which judgment, and an order denying a new trial, defendant has appealed. The cause originated in a justice of the peace court, and was taken to the district court by appeal.

We think the district court entertained an erroneous view as to the plaintiff's rights. The statute relied on for recovery reads, in part, as follows: "Sec. 3165 [Revised Codes]. Fees of notaries public. * * * For drawing an affidavit, deposition, or other paper, * * * for each folio unless otherwise prescribed, twenty cents. For taking an acknowledgment or proof of a deed or other instrument, to include the seal and the writing of the certificate, for the first signature, one dollar. For each additional signature, fifty cents. For administering an

oath or affirmation, twenty-five cents. For certifying an affidavit, with or without seal, including oath, fifty cents."

When the plaintiff was employed to take these depositions by Mr. Brown, it was his privilege to do one of three things, viz.: (1) He could write out the testimony himself, or (2) employ a stenographer to do so at whatsoever compensation might be agreed upon between them, or (3) allow the defendant to furnish the stenographer. In the first two cases he might legally charge full statutory rates for the work of taking and transcribing the testimony. In the third case he could not so charge, for the very obvious reasons: (1) That he did not perform the work; and (2) by failure to insist upon his right to furnish the stenographer, he impliedly consented to the employment of that person by the defendant. As Riley has been fully paid, it would be manifestly unjust to compel the defendant to pay twice for the same services. The general policy of the law on the subject of double payment for services is clearly indicated by section 7199, Revised Codes, which reads as follows: "In all cases where copies of pleadings, affidavits, or other papers are to be served, neither the sheriff nor clerk shall charge or receive a fee for making such copies when the same are furnished to such officer by the party to the action or his attorney."

We have not had the benefit of any argument, either written or oral, in behalf of the respondent, and are therefore unable to ascertain how he arrived at the amount claimed, to-wit, \$61.80. The depositions contained two hundred and ninety-four folios of testimony, which, at twenty cents per folio, would amount to \$58.80. This sum is \$3 less than the amount claimed; whereas, the amount actually due him was \$1.50 for certifying the three depositions, including the administering of the oaths. It does not appear that any tender or offer of judgment was made by the defendant, and it was therefore necessary for the plaintiff to invoke the aid of the courts in order to recover the amount due him.

The cause is remanded to the district court, with direction to reduce the judgment to the sum of \$1.50, and, as so reduced, it

will stand affirmed. The order denying a new trial is affirmed. Let the costs of appeal be paid by the appellant.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

OFFICER, RESPONDENT, v. SWINDLEHURST ET AL., APPELLANTS.

(No. 2,804.)

(Submitted April 4, 1910. Decided April 18, 1910.)

[108 Pac. 583.]

Parent and Child—Services of Latter—Compensation—Implied Contract—Validity.

Parent and Child—Services—Compensation.

1. Where an agreement has been made by a parent to pay for the services of his child, it can be enforced, and a conveyance of property in payment for services rendered will be upheld in the absence of actual fraudulent intent.

Same—Services—Compensation—Implied Contract.

2. A contract to pay for services rendered by a child to its parent may be inferred from circumstances, or may arise from operation of law.

Same—Services—Compensation—Implied Contract—Consideration.

3. After a daughter became of age she left home and was earning her own as well as a younger brother's living. Three years later her father received an injury which permanently incapacitated him from further physical exertions, and the daughter was called home and from that time furnished practically all the maintenance of the family. About a year thereafter the father, in consideration of past and future services, conveyed to her a piece of property upon which she placed valuable improvements. *Held*, that under these circumstances there was an implied promise on the part of the father, upon the return of the daughter, to pay for the services to be rendered by her, and that the amount due on the date of the conveyance for past services was a valuable consideration for the same.

Appeal from District Court, Park County; Frank Henry, Judge.

SUIT by Kate M. Officer against J. E. Swindlehurst and another. From a decree for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Cause submitted on briefs of counsel.

Mr. A. P. Stark submitted a brief in behalf of Appellants.

Services of a son or daughter, rendered while remaining in the father's family after becoming of age without a contract for payment, are deemed gratuitous. They will not even form a consideration which will protect a transfer of securities afterward made by the father to the child against claims of creditors. (*Guffin v. First Nat. Bank*, 74 Ill. 259.) Evidence that a daughter rendered services to her father while living as a member of his family, without any express contract for hire, does not show a valuable consideration for the transfer to her of property while he is insolvent. (*Ionia Co. Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159.) Services rendered by children to their father, while residing with him, without any agreement for compensation, do not constitute a valuable consideration of a deed of land from him to them, as against his creditors. (*Sanders v. Wagonseller*, 19 Pa. 248; *Lord v. Locke*, 62 N. H. 566; *Haney v. Nugent*, 13 Wis. 283; *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847.)

If by a secret understanding the consideration of the transfer in whole or in part is an obligation for the future support of the grantor or his family, the transfer is either *prima facie* or conclusively fraudulent and void as to existing creditors. (20 Cyc. 533, 570.) A conveyance by an insolvent, in consideration of his future support, is void so far as it puts the property of the grantor out of the reach of his creditors. (*Mallow v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; *Coleman v. Gammon* (Iowa), 83 N. W. 898; *Spiers v. Whitesell*, 27 Ind. App. 204, 61 N. E. 28; *Tenbrook v. Jessup*, 60 N. J. Eq. 234, 46 Atl. 516; *Hanna v. Charleston Nat. Bank*, 55 W. Va. 185, 46 S. E. 920; *Walker v. Cady*, 106 Mich. 21, 63 N. W. 1005; *Kelsey v. Kelley*, 63 Vt. 41, 22 Atl. 597, 13 L. R. A. 640.) In the case of *Seekel v. Winch*, 108 Iowa, 102, 78 N. W. 821, the court holds that a conveyance for future support of the grantor is voluntary, and the grantee has the burden of showing that the grantor had other property sufficient to pay his debts.

Messrs. John T. Smith & Son, for Respondent, submitted a brief.

A conveyance by a parent to his children in consideration of services rendered under an agreement previously made for compensation therefor is valid as against creditors of the parent. (*Mitchell et al. v. Simpson*, 62 Kan. 343, 63 Pac. 440; *Citizens' State Bank v. Weston*, 103 Iowa, 736, 72 N. W. 542; *Leque v. Stoppel*, 64 Minn. 152, 66 N. W. 124; *Byrnes v. Clark*, 57 Wis. 13, 14 N. W. 815.) Nor does this compensation have to be an agreed amount. (*Low v. Wortman*, 44 N. J. Eq. 193, 7 Atl. 654, 14 Atl. 586; *Stewart v. Small*, 11 Ind. App. 100, 38 N. E. 826.) This court has laid down the following rules in this respect: "The fact that a conveyance of the land is from daughter, or *vice versa*, is not sufficient to stamp it with fraud," and "Mere inadequacy of consideration is not in itself sufficient cause to invalidate a conveyance, except in extreme cases." (*Mueller v. Renkes*, 31 Mont. 100, 77 Pac. 512.)

MR. JUSTICE SMITH delivered the opinion of the court.

The plaintiff in her complaint alleges: That she is the owner in fee and in possession of a certain lot, 50 feet wide and 150 feet deep, situated at Hunter's Hot Springs, in Park county; that one W. C. Officer, formerly the owner of the lot, conveyed the same to her, for a valuable consideration, on the twenty-seventh day of June, 1902; that on December 1, 1904, a judgment for \$2,913.58 was recovered in the district court of Park county, by the defendant Swindlehurst against said W. C. Officer, and thereafter, on June 26, 1905, an execution issued upon said judgment, and the defendant Robertson, as sheriff, sold all of the right, title and interest of W. C. Officer in and to the premises to the defendant Swindlehurst for \$1,500, and issued to the latter a certificate of sale for the same. She prays that she be decreed to be the owner of the lot; that her title be quieted; that the claim of Swindlehurst be adjudged to have no validity; that the sale by the sheriff be declared null and

void; and that the latter be restrained from issuing a deed to his codefendant.

The amended answer sets forth affirmatively that in 1894 three certain judgments were entered in the district court of Park county against W. C. Officer and one Fargo; that certain property was sold and the proceeds applied toward the satisfaction of said judgments, leaving a balance due on each judgment; that afterward, and during the year 1898, the deficiency judgments were all assigned to James A. Murray; that on October 26, 1904, the defendant herein, Swindlehurst, who was then the owner of the same, began an action on the several judgments against W. C. Officer, which action resulted in another judgment against Officer for the sum of \$2,913.58; that on May 19, 1905, execution was issued upon the last judgment, levied upon the land mentioned in the complaint herein, the same was sold to Swindlehurst for the sum of \$1,500, and a certificate of sale therefor issued to him. It is also alleged that the sale of June 27, 1902, from Officer to the plaintiff, who is his daughter, was made for the purpose of concealing his property from the holders of the aforesaid judgments, and to hinder, delay and defraud the owners thereof; that the same was without consideration, was wholly voluntary, sham, fictitious and void. Defendants also aver that W. C. Officer has owned no other property since February 4, 1895, and it was and is impossible to collect the amount of said judgment from him without resorting to the land in controversy.

For replication the plaintiff sets forth that she became eighteen years of age in 1898, at which time she was residing with her father and mother at Hunter's Hot Springs; that her mother was an invalid and unable to work; that plaintiff had three brothers, minors of tender age, who were unable to be of any considerable assistance to her parents in gaining a livelihood for the family; that she remained at home, assisting in the household duties, except during a portion of the time when she was at school in Bozeman, during which time she worked for her board and that of a younger brother; that on April 23, 1901,

her father was injured and became paralyzed, and has since been an invalid, unable to work or support his family; that on account of the injury to her father she was called home to support the family; that she henceforth remained at home, "took in sewing and washing and such other work as she could procure from the hired men and guests at the Hunter's Hot Springs Hotel, and also took boarders, and thereafter, on the twenty-seventh day of June, 1902, she not hitherto having received any compensation for her services, her father, for and in consideration of her services so rendered and of an agreement on her part that she would continue to care for, support, and maintain her father, he and her mother made and executed the deed to the property mentioned in the complaint"; that she has fully carried out the agreement on her part; "that in the year 1903 she cleared the sum of \$1,400 by boarding men, and with that money and other money which she has earned since, she has constructed a frame building on the premises, in which she resides with her father and mother and in which they keep a small notion store; that at the time she received the deed to the property none of the judgments mentioned was a lien upon the same; that she purchased in good faith and has since improved the same to the extent of about \$4,000, all of which money she has invested in good faith, relying upon the title conveyed to her by her father, and all of which improvements were placed thereon by her while the defendant Swindlehurst and his assignor, Murray, well know that she was so investing her money and improving the property, and that Swindlehurst and Murray are both estopped from disputing her title."

The cause was tried to the district court of Park county, sitting with a jury. The following special verdict was returned:

"Interrogatory No. 1. Was there any consideration passed from the plaintiff to W. C. Officer for the transfer to her of the property described in the pleadings; and, if there was, what was such consideration? Answer: Yes. Labor and services.

"Interrogatory No. 2. Was W. C. Officer, at the time he executed the deed to Kate M. Officer, on the twenty-seventh

day of June, 1902, indebted to the said Kate M. Officer for labor and services rendered by her to him after she became eighteen years of age? Answer: Yes.

“Interrogatory No. 3. Did the plaintiff at the time she purchased the land from W. C. Officer take the deed in good faith, and without any design on her part to hinder, delay, or defraud the creditors of the said W. C. Officer in the collection of their debt? Answer: Yes.

“Interrogatory No. 4. Did the plaintiff at the time she received the deed from W. C. Officer and wife agree, as a part of the consideration for said conveyance, with the said W. C. Officer that she would improve the said premises, and allow the said W. C. Officer and wife, her parents, to remain with her, and that she would help support and maintain them; and, if your answer to this interrogatory thus far is in the affirmative, has the plaintiff since hitherto carried out her contract with the said W. C. Officer and wife, and fully performed the conditions of the same, as to improving the said premises and caring for and maintaining the said W. C. Officer and wife? Answer: Yes; she has.”

The jury also returned the following general verdict: “We, the jury impaneled and sworn in the above-entitled action, find for the plaintiff.” The court adopted the findings of the jury, and entered a decree thereon in favor of the plaintiff for the relief demanded in her complaint. From the judgment and an order denying a new trial, the defendants have appealed.

The testimony of the plaintiff tended to substantiate the allegations of her replication, so far as the same relate to the services performed by her and the improvements she has caused to be placed upon the property. She also testified: “The consideration that passed from me to my father for these premises was my agreement to look after it to the best of my ability and improve it and make a home for father and mother and my small brother. * * * A part of the consideration for the deed was my promise to improve the premises and make a home for my parents and smaller children. * * *

Father and mother went to Livingston to have the deed made. * * * There was nothing unusual about their leaving home at that time which particularly impressed it upon my mind, except the fact that I was to receive this piece of property for my services. * * * From 1898 until the execution of this deed, all my time and everything I earned was turned in to support the family, except my own board and clothes. About 1901 I was in Bozeman going to school, and was called home on account of an injury to my father, and he has never recovered from it. * * * In May, 1904, the improvements on the place were commenced. The money to build the house was earned cooking for a crew of men that put in the water-works at the springs, and doing anything else that I could get to do from that. Mr. Murray was about the springs the summer of 1904, and lived right next door to us. I had conversation with him about these improvements in the summer of 1904. He made no claim whatever to the property. * * * I became of age in 1898. * * * I supposed that all of these old judgments had been satisfied when everything father owned had been taken for his debts, with the exception of this one lot, and I didn't know there was anything against this place until after it was in my possession." When the plaintiff was asked by her counsel to tell what services she performed for the family prior to the date of the conveyance, the defendants' counsel objected to the question on the ground that no claim is made in the complaint "that the consideration for the conveyance was for past services rendered." The objection was overruled and an exception noted, but no error is now predicated upon the ruling; so that we may assume that the case is presented to us solely upon the questions hereafter considered, regardless of any question of pleading. We are, then, to determine what the relative rights of the parties are as disclosed by the evidence.

Two contentions are advanced by the appellants, viz: (1) That, in the absence of an agreement between plaintiff and her father that she was to receive compensation for her services

after she became of age, any services which she did render are presumed to have been gratuitous on account of the relationship of the parties, and do not constitute a valid consideration for the conveyance of property as against the father's creditors; and (2) that an agreement on her part to support her father and mother in the future is either *prima facie* or conclusively fraudulent, and void as to existing creditors of her father.

It may first be noted that no question of inadequacy of consideration is involved. In fact, there is no testimony as to the value of the lot at the time of the conveyance from Officer to his daughter. The contention of the appellants is that the conveyance was in the light of the testimony fraudulent as a matter of law. One of the cases confidently relied upon by the appellants is *Guffin v. First Nat. Bank of Morrison*, 74 Ill. 259. In that case the court said: "No principle is better settled than where a son or daughter remains in the father's family after becoming of age, in the absence of a contract, such person can recover nothing for services rendered, and whatever the father may choose to give in after years is nothing more than a mere gift. He is under no legal obligation to make any recompense. The son or daughter is presumed to have rendered such services gratuitously." In the case of the *Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159, it appeared that a daughter lived with her father as a member of his family for some eleven years after attaining her majority, and performed services during that time, but without any contract for hire. It was held that she had no valid claim which could be enforced either against him or his estate. See, also, to the same effect, *Sanders v. Wagonseller*, 19 Pa. 248; *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847. The supreme court of Iowa in *Harris v. Brink*, 100 Iowa, 366, 62 Am. St. Rep. 578, 69 N. W. 684, stated the second rule relied upon by the appellants thus: "The authorities proceed upon the theory that it is the legal duty of a debtor to pay his debt rather than to provide for his future support." (See, also, 20 Cyc. 533-570.)

On the other hand, it is almost uniformly held that, where an agreement to pay for services has been made, it can be enforced, and a conveyance of property in payment for services rendered will be upheld, in the absence of actual fraudulent intent. (See *Mitchell v. Simpson*, 62 Kan. 343, 63 Pac. 440; *Byrnes v. Clark*, 57 Wis. 13, 14 N. W. 815; *Leque v. Stoppel*, 64 Minn. 152, 66 N. W. 124; *Citizens' State Bank v. Weston*, 103 Iowa, 736, 72 N. W. 542.) And the contract may be inferred from circumstances or may arise by operation of law. The supreme court of Wisconsin, in *Byrnes v. Clark*, *supra*, said: "If there is an express contract to pay for the services, the child thereby becomes the servant of the father in respect to such services, and may recover *quantum meruit*." (See, also, Schouler's Domestic Relations, 5th ed., sec. 269.) In *Snyder v. Free*, *supra*, the supreme court of Missouri said: "The ordinary presumption as to such services [that they were gratuitous] may be overcome by proof of an express or implied contract which looks to compensation as a reward for services rendered." A contract to pay may be inferred from circumstances. (*House v. House*, 6 Ind. 60.) We must not forget that the rule of law which denies a right of recovery to the child, in the absence of a contract for compensation, is at best founded only in presumption. In the absence of proof to the contrary, such services are presumed to have been gratuitously rendered. The great majority of the decided cases dealing with the subject relate either to causes like the one at bar, or to those involving claims against the estate of a deceased parent; and the presumption appears to have arisen from the necessity of affording protection to creditors and others in the circumstances. But we are inclined to the opinion that, where the circumstances of the particular case tend to rebut the presumption, those circumstances may well be taken into consideration, especially by a court of equity, in determining whether the claimant to compensation may rely upon an implied promise to pay for the services rendered.

Assuming, then, that the agreement to look after and improve the property and make a home for the father and mother was

not a sufficient consideration for the transfer in this case as against existing creditors, it still remains to be determined whether the father was not bound as upon implied contract to pay what the daughter's services were reasonably worth.

In the case of *Reando v. Misplay*, 90 Mo. 251, 59 Am. Rep. 13, 2 S. W. 405, it was held that where a daughter rendered services to her insane mother, in taking care of her, and intended, while so doing, to charge for the same, and such services were necessary for the comfort and well-being of the mother, the daughter might recover for the services. It was there said, however, that, if the services were rendered as acts of gratuitous kindness, and as a member of the family, with no intention of charging for the same, the daughter could not recover, and that in such latter case it would make no difference how meritorious and valuable they may have been. In the case of *Fisher v. Fisher*, 5 Wis. 472, it was held that where a son continued to reside with, and labor for, his father after arriving at the age of majority, there might be circumstances, short of an express promise to pay on the part of the father, entitling the son to recover for his services. The court said: "But it would manifestly have been incumbent upon the son to show that the ordinary relation of child and parent did not subsist between him and his father, and that it was the understanding of the parties that he should have compensation for his services." The supreme court of Indiana has said: "It is a general rule that where a child continues with the parent after becoming of age, no express contract for wages being shown, the presumption is no wages are to be paid. But a contract to pay a reasonable compensation may be inferred from circumstances tending to rebut the presumption that there was to be no compensation." (*Adams v. Adams*, 23 Ind. 50.) And the supreme court of North Carolina in *Young v. Herman*, 97 N. C. 280, 1 S. E. 792, recognized the same rule. (See, also, *Hilbish v. Hilbish*, 71 Ind. 27; *Hart v. Hess*, 41 Mo. 441; *Fitch v. Peckham*, 16 Vt. 150; *Miller v. Miller*, 16 Ill. 296.) In the case of *Mitchell v. Simpson*, *supra*, the supreme court of Kansas said:

“That after an adult child has performed services without an agreement for compensation the parent, as an inducement to remain in the service of the family, may lawfully promise to pay for what before that time had been performed without an agreement, cannot, as we think, be questioned. If *bona fide*, the transaction is unassailable.” The case of *Freeman v. Freeman*, 65 Ill. 106, very well illustrates the situation of the plaintiff in this case. It there appears that a son, some time after his majority, left his parents, commenced business on his own account, and was afterward induced by his father to return, all his other sons having left him, and he continued to labor for his father for many years, managing his affairs and supporting his parents, for which he received nothing but his board, scanty clothing, and a little spending money. The proof also showed that the father intended to compensate him by devising his farm to him, but was killed before he had made his will. It was held that it was but reasonable to presume that the father intended to pay and the son to receive pay for his labor, either in money or by devise in the father’s will, and that a verdict in favor of the son for services against the father’s estate would not be disturbed.

The transcript before us has not been prepared in accordance with paragraph 3 of Rule VII of this court (37 Mont. xxviii, 57 Pac. vi), in that, this being an equity case wherein questions of fact arising upon the evidence are submitted for review, the testimony should have been presented by question and answer. Mention is made of this simply to emphasize the idea that the judge and jury below were in a much better situation to draw proper conclusions than are the members of this court. We are obliged, therefore, to place a greater reliance upon the findings than would otherwise be necessary.

It appears that the first judgment against Officer was recovered more than ten years before the commencement of this action, and that after everything which he owned, with the exception of the lot in controversy, had been taken for his debts, the balance was allowed to remain wholly unsatisfied

until it was no longer a lien upon the lot. In the meantime the plaintiff became of age and left home, going to Bozeman to school, during which time she worked for her board and that of a younger brother. On April 23, 1901, her father received an injury which seems to have incapacitated him for further physical exertions in behalf of himself or family, and requested her to return home. She was then twenty-one years of age, and, according to the undisputed testimony, was depending upon her own labor, not only for her own education and support, but for the support of her younger brother as well. She may well be considered as having severed her relations with her father's family when she went to Bozeman, and as having returned at his request, not merely as a daughter, but as one who was to furnish practically all of the maintenance for her family from that time on. Indeed, we think, under the circumstances, the jury would have been justified in finding an implied promise to pay for the services without any further testimony. But there is more. The father himself, evidently realizing the injustice and inhumanity of allowing her to expend the best years of her life in hard labor without compensation, finally agreed to recompense her for what she had done and for her future services. It is true that in one aspect this agreement was illegal as to existing creditors, but the fact that it was made demonstrates beyond a doubt that neither Officer nor his daughter regarded the services as gratuitous. This being so, an implied promise to pay *quantum meruit* immediately arose, and, if anything was due her on June 27, 1902, the amount then due was a valuable consideration for the conveyance which she received on that date, provided the transaction was had in good faith, and as to that there can be no doubt under the testimony. It appears that she had worked for, nursed and supported the family for about fourteen months prior to the time when she received the deed, and she herself says: "I was to receive this piece of property for my services." There is no testimony as to what her services were worth, but neither is there any as to the value of the lot; and, as defendant Swindlehurst's prede-

cessor in interest made no effort to subject it to the satisfaction of his judgment, although he lived in the vicinity, it may fairly be presumed that its value was small prior to the time when plaintiff improved the same.

We think the right party had judgment in the district court, and that the order denying a new trial should be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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WHITE ET AL., RESPONDENTS, v. BARLING, APPELLANT.

(No. 2,813.)

(Submitted April 6, 1910. Decided April 18, 1910.)

[108 Pac. 654.]

Appeal—Equity Cases—Findings—Review—Evidence—Presumptions.

Appeal—Equity Cases—Findings—Review.

1. Where the record on appeal in an equity case shows substantial testimony to support the district court's findings, the supreme court will not disturb them.

Same—Evidence—Record—Presumptions.

2. Error may not be predicated upon the action of the trial court in excluding competent testimony offered in a water right suit which was tried without the aid of a jury, where appellant subsequently succeeded in incorporating such testimony into the record. The presumption obtains that the court, in arriving at a conclusion, considered it.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by William D. White and another against Fred W. Barling. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

In behalf of Appellant, there was a brief by *Mr. T. S. Hogan*.

Mr. O. F. Goddard submitted a brief in behalf of Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

This cause has been in this court once before. At the first trial, held before Judge Loud, in Yellowstone county, the jury found that the capacity of plaintiffs' ditch was thirty miners' inches of water. Upon motion of the plaintiffs a new trial was ordered. The defendant appealed, and the order was affirmed. (*White v. Barling*, 36 Mont. 413, 93 Pac. 348.) The second trial took place before Judge Fox, without the aid of a jury. The court made the following findings of fact and conclusions of law:

“FINDINGS OF FACT.

“(1) That at the time the defendant made his appropriation of the waters of Blue creek, the plaintiffs' ditch would carry and deliver upon their lands ninety inches of water, statutory measurement, which amount of water the plaintiffs had before the appropriation of the defendants appropriated and used for irrigation and other useful purposes on their respective lands described in the complaint.

“(2) That while Blue creek at the dry seasons of the year runs dry in places, the water sinks and rises again, and is, with the exception of a few days at a time, a running stream so that some water would reach the dam and headgate of the plaintiffs, if not diverted by the defendant, and which could be used by the plaintiffs for the irrigation of their lands.

“(3) That the defendant, during the irrigating season of the years 1904 and 1905, diverted and used upon his lands for irrigation quantities of water of Blue creek which would, if it had been allowed to flow in the channel, have flowed down to the dam and headgate of the plaintiffs, and that it could have been used for beneficial purposes by the plaintiffs.

“CONCLUSIONS OF LAW.

“(1) That the plaintiffs are entitled to the exclusive and uninterrupted flow and use of all of the waters of Blue creek that will naturally flow down to their dam and headgate up to the quantity of ninety miners' inches, statutory measurement, before the defendant is entitled to divert or use any water from said creek.

“(2) That the plaintiffs are the owners of and entitled to the free and uninterrupted use of said ninety inches of the waters of Blue creek, as against the defendant at all times.

“(3) That plaintiffs are entitled to a permanent injunction against the defendant, restraining and enjoining him from interfering with the exclusive and uninterrupted use and enjoyment of the said ninety inches of the waters of Blue creek at all times.”

Judgment was entered for the plaintiffs in accordance with the findings of fact and conclusions of law, and from that judgment and an order denying a new trial the defendant has appealed.

It is contended by counsel for the appellant that the testimony is insufficient to warrant the finding of the court as to the carrying capacity of plaintiffs' ditch prior to the defendant's appropriation; and also the findings that Blue creek, the stream in question, is, with the exception of a few days at a time, a running stream so that some water would reach plaintiffs' headgate, if not diverted by the defendant, and, if the defendant had not diverted the water in 1904 and 1905, it would have reached the plaintiffs' headgate in an amount sufficient for beneficial use. In order to correctly decide these questions, we have carefully read and analyzed all of the evidence. While the testimony of the defendant and his witnesses appears to us to have been much more definite and certain in character than that produced by the plaintiffs upon both of the main questions involved, the evidence as a whole is nevertheless conflicting, and we find substantial testimony in support of the

court's findings. Under these circumstances, we cannot disturb them. (*Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860.)

Some complaint is made, in the brief, of the action of the court in rejecting certain testimony regarding the condition of Blue creek during the years from 1906 to 1909. Paragraph "b" of Rule X of this court has not been complied with in bringing this matter to the attention of the court; but notwithstanding this, we have considered it. We think the testimony was competent; but our examination leads us to the conclusion that the appellant finally succeeded in getting it all into the record, and the presumption is that it was considered by the court.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

THURMAN, APPELLANT, v. PITTSBURG & MONTANA COP-
PER CO. ET AL., RESPONDENTS.

(No. 2,808.)

(Submitted April 5, 1910. Decided April 18, 1910.)

[108 Pac. 588.]

*Personal Injuries—Master and Servant—Mines—Pleadings—
Statutory Actions—Variance—Creating Place to Work—As-
sumption of Risk—Fellow-servants.*

Personal Injuries—Pleading—Statutory Actions.

1. Where a servant relies for recovery for personal injuries on a special statute creating a liability on the part of the master where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute.

Same—Master and Servant—Pleading—Statutory Provisions.

2. Under Revised Codes, section 5248, declaring that every person operating a mine shall be liable for injuries to employees when caused by the negligence of any superintendent, foreman, shift-boss, etc., a complaint which charged defendant company and its foreman with

primary negligence in failing to use ordinary care to furnish plaintiff a safe place to work, and did not allege any specific acts of negligence on the part of the foreman imputable to the master, failed to state a cause of action falling within that section.

Same—Pleading and Proof—Variance—Nonsuit.

3. The plaintiff in a personal injury action may recover only upon proof establishing substantially the cause of action alleged; hence where the evidence tended to show an act of negligence other than the one relied on in the complaint, the court properly granted a nonsuit on the ground of variance.

Same—Mines—Shift-boss—Fellow-servant.

4. A shift-boss in a mine whose duty extends no further than to guide and direct the employees under him in the performance of the particular work in which he is engaged with them, is, under the common-law rule, a fellow-servant of his coemployees.

Same—Mines—Assumption of Risk.

5. Plaintiff, a miner, had been working in the place where he was injured for about seventeen days, and was familiar with the ground. After having been told by the shift-boss that the ground was safe and instructed to proceed with timbering, he left the workings to procure timbers and returned after an absence of over three hours. Without seeing whether the ground, after that lapse of time, was still safe, and omitting the usual precaution of putting up temporary lagging to protect himself, he proceeded to put in the timbers, and was injured by falling rock. *Held*, that he assumed the risk incident to working under such conditions, since the danger was open and obvious.

Same—Mining—Creating Place to Work—Assumption of Risk.

6. The rule that the master is bound to use ordinary care to furnish the servant a reasonably safe place in which to work has no application to a case where the latter's employment consists in creating the place of work, as in mining; any dangers arising from the work as it progresses or while making a dangerous place safe are assumed by the servant. After completion of the place, however, it is incumbent upon the master to keep it safe, and to that end to inspect and repair it from time to time.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Court Thurman against the Pittsburgh and Montana Copper Company and another. From a judgment for defendants and from an order denying a new trial, plaintiff appeals. Affirmed.

For Appellant, there was a brief by *Messrs. Mackel & Meyer*, and oral argument by *Mr. Alex. Mackel*.

Even though the servant may be engaged in creating a place; even though hazards and risks may be constantly changing; or even though the servant may be engaged in "making a dan-

gerous place safe," the master must exercise ordinary care, and if he fails to do so, and the result of his failure in this respect is injury to the servant, the master is liable. (*Cleveland etc. Co. v. Foland* (Ind. App.), 88 N. E. 787; *Bradley v. Chicago M. etc. Co.*, 138 Mo. 293, 39 S. W. 763; *Ward Co. v. Edison etc. Co.*, 124 App. Div. 22, 108 N. Y. Supp. 608; *Byrne v. Brooklyn City R. Co.*, 6 Misc. Rep. 441, 27 N. Y. Supp. 126; *Kohout v. Newman*, 96 Minn. 61, 104 N. W. 764; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 465, 39 L. Ed. 464.) The following cases are almost "on all-fours" with the case at bar, and in each the defendant was held liable: *Superior C. & M. Co. v. Kaiser*, 229 Ill. 29, 120 Am. St. Rep. 233, 82 N. E. 239; *Sonnenberg v. Southern Pac. Co.*, 159 Fed. 884, 87 C. C. A. 64; *Western C. & M. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Hanley v. California etc. Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; *Millen v. Pacific Bridge Co.*, 51 Or. 538, 95 Pac. 196; *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, 59 N. E. 254.

In the following cases the servant was held not to assume the risk: *Taylor v. Starr Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Haggerty v. H. G. Co.*, 89 Me. 118, 35 Atl. 1029; *McCoy v. Town of Westboro*, 172 Mass. 504, 52 N. E. 1064; *Garity v. B. B. & C. M. Co.*, 27 Utah, 534, 76 Pac. 556; *McCoy v. N. H. & E. Co.*, 104 Minn. 234, 116 N. W. 488; *Cons. Coal Co. v. Lundak*, 196 Ill. 594, 63 N. E. 1079. Danger from work in an adjoining mine: *Williams v. Sleepy Hollow Min. Co.*, 37 Colo. 62, 7 L. R. A., n. s., 1170, 86 Pac. 337, 11 Ann. Cas. 111. A higher duty of inspection rests on the employer than on the employee: *Baltimore & Ohio R. Co. v. Walker*, 41 Ind. App. 588, 84 N. E. 731; *Fitzsimmons v. City of Taunton*, 160 Mass. 223, 35 N. E. 549; *Pachko v. W. Coke & Coal Co.*, 46 Wash. 422, 90 Pac. 436; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863.

The contention will probably be made that the failure to timber was the negligence of the previous shift; and that they were fellow-servants of the plaintiff. On this subject, in ad-

dition to what is stated in *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582, we invite attention to the case of *Shannon v. Consolidated T. & P. Min. Co.*, 24 Wash. 119, 64 Pac. 170, where it is held that the danger created by the off-going shift should be communicated to the on-going shift, and the failure to do so is the negligence of the master. See, also, the following: *Union Gold Min. Co. v. Crawford*, 29 Colo. 511, 69 Pac. 601, 22 Morr. Min. Rep. 213; *Czarecki v. Seattle etc. Co.*, 30 Wash. 288, 70 Pac. 750; *Tradewater Coal Co. v. Johnson*, 24 Ky. Law Rep. 1777, 72 S. W. 274, 61 L. R. A. 161; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Cunningham v. Union Pac. Ry. Co.*, 4 Utah, 206, 7 Pac. 795.

“A servant has a right to rely upon the representations and assurances of the master, or his vice-principal, as to the absence of, or precaution against danger, unless the danger is obvious and imminent.” (26 Cyc. 1185.) In the case at bar, when the master ordered the plaintiff into this place, told him to timber the same, and assured him that the place was safe, the plaintiff was not proceeding on his own judgment. He did not assume the risk of making a dangerous place safe, or the risk attendant upon creating a place, but he was justified in assuming that the master had exercised ordinary care to furnish him a reasonably safe place. Of course, if after that the servant changed the condition and this change of condition caused the injury, the master would not be liable. But such is not the situation in the case at bar. The duty of the servant to obey when he receives an order from the master has been so recently discussed by this court that we will not do more than to cite the cases. (*Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619; *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.) Anticipating that the contention will be made that the plaintiff knew as much about the operation of drills, etc., we will say that assumption of risk is not predicable upon mere knowledge of conditions, but the circumstances must be such that no other inference than that he appreciated the danger is fairly deducible therefrom. (*Hollingsworth v.*

Davis-Daly Estates C. Co., 38 Mont. 143, 99 Pac. 149; *Choctaw etc. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 7 Ann. Cas. 430, 4 L. R. A., n. s., 838; *Galven v. Brown*, 53 Or. 598, 101 Pac. 677.) In view of the fact that the burden of proof of assumption of risk is on the defendants, no presumption arises in their favor, and looking at it from the most favorable standpoint of the defendants' side, this was a question for the jury. (*Hargesty v. Largey Lumber Co.*, *supra.*)

Messrs. Kremer, Sanders & Kremer submitted a brief in behalf of Respondents. *Mr. Louis P. Sanders* argued the cause orally.

Where the complaint specifies negligence of a certain employee of defendant, recovery cannot be had on proof of other negligence of another employee. (*Thomas v. Louisville & N. R. Co.* (Ky.), 35 S. W. 910; *Howard v. C. & O. Ry. Co.* (Ky.), 90 S. W. 950.) In *Albrecht v. Milwaukee & S. Ry.*, 87 Wis. 105, 41 Am. St. Rep. 30, 58 N. W. 72, it is held that a complaint by a railroad servant against his employer under an Act substantially like that of Montana, for injuries caused by the negligence of any train dispatcher, telegraph operator, superintendent, etc., must specify to which of these classes the negligent person belonged. In the case at bar the negligence imputed to the defendant corporation was that of Ray, the foreman, and to no shift-boss or any other class. The negligence charged was specific and cannot be proved by any other negligence. (See *Forsell v. Pittsburgh & Montana Copper Co.*, 38 Mont. 403, 100 Pac. 218; *Ft. Wayne Iron & Steel Co. v. Parsell*, 168 Ind. 223, 79 N. E. 439.) The complaint must allege the negligence of the vice-principal and prove it as alleged. (*Collier v. Coggins*, 103 Ala. 281, 15 South. 578; *Campbell v. Wing*, 5 Tex. Civ. App. 431, 24 S. W. 360; *Atchison T. & S. F. R. Co. v. O'Neill*, 49 Kan. 367, 30 Pac. 470.)

It is elemental law that where the danger of the work is obvious, the servant assumes the risk, although the master assures

him that it is safe; hence, plaintiff cannot successfully contend that he may be absolved from all claims of contributory negligence or assumption of risk and recover on the strength of what Johnson, the shift-boss, told him. (*Perschke v. Hencken*, 44 N. Y. Supp. 265; *Rohrabacher v. Woodward*, 124 Mich. 125, 82 N. W. 797; *Showalter v. Fairbanks M. & Co.*, 88 Wis. 376, 60 N. W. 257; *Anderson v. Lumber Co.*, 47 Minn. 128, 49 N. W. 664; *Anderson v. Winston*, 31 Fed. 258; 20 Am. & Eng. Ency. of Law, 2d ed., 120.)

Such risks are assumed as should become apparent to the employee, or where his means of knowledge are equally as great as those of his employer. Where, considering the nature of his employment, he should not be reasonably expected to know such dangers, the rule is different, of course, and this vital difference is made clear in the case of *Hollingsworth v. Davis-Daly Co.*, 38 Mont. 143, 99 Pac. 149. (See Wood on Master and Servant, p. 791; *Fisk v. Central etc. Co.*, 72 Cal. 38, 1 Am. St. Rep. 22, 13 Pac. 144; *Garden City Wire Springs Co. v. Boecher*, 94 Ill. App. 96; *McCormick etc. v. Zakzewski*, 220 Ill. 522, 77 N. E. 147, 4 L. R. A., n. s., 848; *Mellott v. Louisville & N. R. Co.*, 101 Ky. 212, 40 S. W. 696; *Holt v. Chicago, M. & St. P. R. Co.*, 94 Wis. 596, 69 N. W. 352; *Weeklund v. S. O. Co.*, 20 Or. 591, 27 Pac. 260; *Jones v. Galveston etc. Ry. Co.*, 11 Tex. Civ. App. 39, 31 S. W. 706; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Wormell v. Maine etc.*, 79 Me. 397, 1 Am. St. Rep. 353, 10 Atl. 49; *Jennings v. Tacoma etc. Co.*, 7 Wash. 275, 34 Pac. 937; *Stewart v. Seaboard Air Line Ry.*, 115 Ga. 624, 41 S. E. 981.) A master is not liable to a servant owing to the caving in of a bank which the servant was working, where the caving in was due to the action of the ground which was as apparent to the servant as to anyone. (*McQueeney v. Chicago M. & St. P. R. Co.*, 120 Iowa, 522, 94 N. W. 1124; *New Omaha etc. v. Rombold*, 68 Neb. 54, 97 N. W. 1030; *Watts v. Hart*, 7 Wash. 178, 34 Pac. 423.)

Appreciation of risk is to be determined from the standpoint of what the party knew or should have known, and when it

appears he knew or should have known of the conditions—always keeping in mind the character of his duties—then as it is declared by Dresser in his work on Employers' Liability, 539, and the decisions, the law will say he must have appreciated the danger. The following cases define the meaning of the term "appreciation" of dangers: *Davis v. Forbes*, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170; *Island Coal Co. v. Greenwood*, 151 Ind. 476, 50 N. E. 36; *Galland v. Great Northern Ry. Co.*, 101 Minn. 540, 111 N. W. 1133; *Poorman Silver Mines v. Devling*, 34 Colo. 37, 81 Pac. 252; *Purkey v. Southern Coal & T. Co.*, 57 W. Va. 595, 50 S. E. 755; *Fort Worth Iron Works v. Stokes*, 33 Tex. Civ. 218, 76 S. W. 231. The rule applicable here is the one declared in *Shaw v. New Year's Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515, that where the servant, in an employment such as mining, is making the place in which he works and constantly changing the conditions as regards increase or diminution of safety, he assumes the risks of the ordinary dangers of his employment. (*Finlayson v. Utica Min. Co.*, 67 Fed. 507, 14 C. C. A. 412; *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463, 58 Am. St. Rep. 505, 64 N. W. 335, 32 L. R. A. 435; *Davis v. Trade Dollar*, 117 Fed. 122, 54 C. C. A. 636; *Maloney v. F. & C. C. R. Co.*, 39 Colo. 384, 121 Am. St. Rep. 180, 89 Pac. 649, 12 Ann. Cas. 621, 19 L. R. A., n. s., 348; *Florence & C. C. R. Co. v. Whipps*, 138 Fed. 13, 70 C. C. A. 443; *Jennings v. Ingle*, 35 Ind. App. 153, 73 N. E. 945; *Richardson v. Anglo American Prov. Co.*, 72 Ill. App. 77; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Armour & Co. v. Dumas*, 43 Tex. Civ. 36, 95 S. W. 710; *Fournier v. Pike*, 128 Fed. 991; *Anderson v. Daly Min. Co.*, 16 Utah, 28, 50 Pac. 815; *Consolidated Coal & Min. Co. v. Floyd*, 51 Ohio St. 542, 38 N. E. 610, 25 L. R. A. 848; *Oleson v. Maple G. C. & Min. Co.*, 115 Iowa, 74, 87 N. W. 736; *Mielke v. Chicago & N. W. R. Co.*, 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; *Di Vito v. Crage*, 165 N. Y. 378, 59 N. E. 141; *Kellyville Coal Co. v. Bruzas*, 223 Ill. 595, 79 N. E. 309.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff to recover damages for personal injuries received by him during the course of his employment by the defendant corporation in its mine in Silver Bow county, and while working under the direction of the defendant Ray, its foreman. The complaint alleges with much detail the circumstances surrounding the accident. It states substantially the following: That during the month of May, 1907, the plaintiff was in the employ of the defendant company as a machine man, competent to operate a compressed-air drill; that he was directed to work at a place in the mine, a particular description of which he cannot give, which had not been timbered; that it was the duty of the defendants to furnish timbermen to timber such places as had been excavated during the progress of the work, and, when the timbermen failed to do the required timbering, to require the shifts of men who had made the excavations to timber them; that the defendants had failed to furnish timbermen and had failed to require the outgoing shift to timber the said place, and thus failed to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work; that the ground at the point where the plaintiff was directed to work was unstable and likely to cave and fall, from slacking upon exposure to the air, if jarred or shaken to the slightest extent; that, notwithstanding this fact, the defendants caused to be operated at various points on the same level upon which plaintiff was working several large compressed-air drills in such close proximity to plaintiff that the blows struck by them against the walls of the mine shook and jarred the ground for a considerable space adjacent thereto, and particularly at the place where the plaintiff was working; that it was exceedingly dangerous to work at that place after an excavation had been made and before it had been properly timbered, and the danger was increased by the operation of the drills, a fact not known to the plaintiff, but well known to the defendants; that the defendants carelessly and negli-

gently directed plaintiff to work in the said place, and that, while he was so engaged at work "and because of the carelessness and negligence complained of," a piece of rock became loose and fell upon his back, causing the injury. It proceeds: "That at the said time plaintiff was acting within the scope of his employment, and acting and working under the orders and directions of the defendants herein, and that at the time he was so injured, he was setting up and preparing his said drill, and getting the same ready and in position, preparatory to drilling holes in the wall at the place wherein plaintiff was at the said time employed, and that all of the things which plaintiff was at the said time doing and performing was a part of plaintiff's employment, and he was acting in the discharge of the duties of, and within the scope of, his employment when he was so injured." Then follow allegations detailing the character of the injury and plaintiff's resulting disability, with demand for judgment. General and special demurrers, interposed by the defendants, having been overruled, they answered, denying all the material allegations of the complaint, and alleging the usual defenses of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow-servant of plaintiff. At the close of plaintiff's case the defendants each moved for a nonsuit, upon the grounds, among others, that the evidence fails to show that either of them was guilty of the negligence alleged in the complaint, and hence that there is a fatal variance between the allegations contained in the complaint and the evidence adduced in support thereof, and that it affirmatively appears that the plaintiff assumed the risk. The motion for nonsuit was sustained and judgment ordered for defendants. From the judgment and an order denying his motion for a new trial the plaintiff has appealed.

Though counsel make three assignments of error, they all present the same question, to-wit: Did the court err in granting the motion for nonsuit? Before entering upon the examination of the evidence, we shall consider briefly the theory of the

action adopted by counsel for plaintiff, as shown by the allegations contained in the complaint.

Section 5248, Revised Codes, declares: "That every company, corporation, or individual operating any mine, smelter or mill for the refining of ores shall be liable for any damages sustained by any employees thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any superintendent, foreman, shift-boss, hoisting or other engineer or cranemen." The purpose and effect of this provision is to declare who among the agents and employees of the owner of a mine, or mill, or smelter, are to be deemed vice-principals for whose negligence the owner may be held liable to other employees, upon the principle embodied in the maxim, "*respondeat superior*"; in other words, to classify the employees by declaring who among them are vice-principals. In so far as it puts into that class employees who under the common-law rule were held to be fellow-servants because engaged with other employees in a common employment for a common purpose, it modifies the common-law rule that the master is not liable for injuries caused to an employee by the negligence of a fellow-servant. It creates a liability where none existed before its enactment by taking away a defense which was theretofore available to the master. In *Kelly v. Northern Pacific Ry. Co.*, 35 Mont. 243, 88 Pac. 1009, this court discussed provisions of a statute having the same purpose and effect with reference to persons and corporations engaged in operating railways. (Revised Codes, sec. 5251.) The cases in which were involved and determined questions touching the form of pleading, which must be adopted in order to state a cause of action under similar provisions, were examined. Following what we deemed the best reasoning upon the subject, the court, through Mr. Justice Smith, said: "In order to settle the rule in this state, we decide that, where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute."

Testing the complaint in this case by this rule, it falls far short of stating a cause of action under the statute. The defendants are charged jointly with primary negligence. Arranging the allegations in logical order, the substance of the charge is that the ground where the plaintiff was occupied was soft and likely to cave and fall because of slacking when exposed to the air; that the danger was increased by concussion produced by the drills; that this fact was known to defendants, and not to plaintiff; that it was the duty of the defendants to furnish timbermen to timber the ground in order that it be properly supported; that defendants failed to do this; that they carelessly and negligently ordered him to work in the excavation before it was timbered, and that because of this negligence, while he was engaged in setting up his machine, a piece of rock fell upon him, inflicting the injury complained of. As observed by Mr. Justice Smith, in the *Kelly Case*, *supra*, in adopting the form he did in charging the negligence upon which is predicated the right to recover, the plaintiff lost sight of the distinction between the acts of the corporation, which, though done by an agent, are yet primarily the acts of the corporation, and those for which it may be held liable upon the principle of the maxim,

respondeat superior." The complaint does not invoke the principle of *respondeat superior* upon which the statute is based, but counts exclusively upon the violation, by both of defendants, of their common-law duty to use ordinary care to furnish the plaintiff with a reasonably safe place in which to do his work. It does not allege any specific act of negligence by Ray, the foreman, which it imputes to the corporation. We must therefore examine the evidence with a view of determining whether it tends to support the cause of action thus stated.

The facts established by the evidence are these: The plaintiff was employed as a machineman, but he was engaged with others in excavating a drift or tunnel on the 800-foot level of the defendant company's mine. His duties included drilling, blasting, and, when the conditions required it, he had to do or to assist in doing the timbering necessary to furnish support to the ground as the excavation progressed. As soon as the excava-

tion at any time progressed far enough to permit the putting in of a set of timbers, the miners on duty were required to put it in. If they failed to put it in, or if the men on any shift on duty neglected to timber as soon as the excavation had progressed far enough, it was customary for the shift boss to stop the work of excavation, and direct them to put in the timbers. The last set had been put in by the plaintiff and another miner who was on shift with him. When they went off shift, the excavation had progressed nearly to the point at which another set of timbers was required. When they returned at the usual time on the next day to resume work, no additional timbering had been done, but the excavation had progressed nearly far enough to require two sets. These sets were six feet in length. When plaintiff went off shift, no timbers had been provided. There were none when he returned. The first thing plaintiff did upon his return was to make an examination of the ground to ascertain if it was safe, and in doing so he picked down any portions of rock that he found loose or likely to fall. While he was so engaged, one Johnson, the shift-boss, came by, and, having looked over the place, said: "That's all right. Go ahead and put in the timbers." He also used the words: "That ground is all right." The plaintiff then, having examined the ground and being satisfied from his examination and the statements of the shift-boss that it was safe, went out to the shaft to obtain timbers. He did not return until some time later; or, as he himself states, until after the lapse of three and one-half hours. He was waiting for the timbers to be brought down from the surface. Whether it was his duty to go to the surface for them does not appear. It does appear that he waited at the shaft until timbers were sent down. Having secured them, he returned, and assisted by his companion, proceeded to put them in without further examination, however, to ascertain if the ground was still safe. While in a stooping position removing some material from the place where he intended to set a timber, a piece of rock fell upon him from the roof of the excavation, and inflicted the injury complained of. It was cus-

tomary for the miners in timbering to protect themselves by putting temporary lagging overhead to prevent the fall of rock from above. During the absence of the plaintiff drilling was in progress in the vicinity of the excavation, but none of the witnesses state definitely whether the concussion produced was sufficient to affect the stability of the ground in the excavation, though the jar was perceptible for some distance in any direction from the places where the drills were in operation. The ground in the vicinity, other than that in the excavation in which the plaintiff was at work, did not generally require timbering.

It thus appears that at the time he was injured the plaintiff was not engaged in setting up his machine under the direction of the defendants, or either of them. He was engaged in making the place safe, so that he and his associates might be protected from the very peril from which he suffered the injury. His complaint is that the defendants failed to furnish timbermen to timber the place, and that he was directed to work there without knowledge of the conditions which actually existed; whereas, if it be assumed that Johnson was at the time acting in the capacity of vice-principal, the negligence which the evidence tends to show is that the plaintiff by reason of the assurance given him by Johnson that the ground was safe, neglected to take the precautions for his own safety which he otherwise would have taken; in other words, he was, through the negligence of Johnson, induced to go into a place of danger, when otherwise he would not have done so. Thus it appears that the evidence does not in any way tend to support the cause of action alleged. In personal injury actions, as in all others, the plaintiff may recover only upon proof establishing substantially the cause of action alleged. (*Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 107 Pac. 416.) Hence the motion for nonsuit was properly granted on the ground of variance. In referring to the language used by Johnson, the shift-boss, we use the term "assurance." We do so in order to give it the construction

most favorable to the plaintiff. To say the least, it is doubtful whether it is susceptible of this construction.

The motion was also properly granted on the ground that the plaintiff assumed the risk. The evidence does not tend to show what the duties of Johnson were. The witnesses refer to him merely as "shift-boss." This court has heretofore held that under the common-law rule a laborer employed by and acting under the orders of a section foreman of a railroad is a fellow-servant of the foreman, and also of the engineer and foreman of a yard engine, and that he cannot recover for injuries suffered through their negligence. (*Goodwell v. Montana Central Ry. Co.*, 18 Mont. 293, 45 Pac. 210; *Hastings v. Montana Union Ry. Co.*, 18 Mont. 493, 46 Pac. 264; *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795.) The same rule applies to a shift-boss in a mine, whose authority over his associates extends no further than to guide and direct them in the performance of the particular work in which he is engaged with them. (*Allen v. Bell*, 32 Mont. 69, 79 Pac. 582.) The only purpose of the legislature in enacting the Code provision, *supra*, was to work a change in this rule. If, in fact, Johnson was engaged in the performance of duties which could not be delegated by the company, he was a vice-principal; otherwise he was a mere fellow-servant of plaintiff, and any negligence of which he was guilty could not be imputed to the company. Under the view we have taken of the case, however, the plaintiff cannot recover even if it be conceded that Johnson was a vice-principal.

The plaintiff, as a reasonable man, must have known of the existing conditions. He had been working there for seventeen and one-half days—not as a machineman, as he alleges, but as a miner. His duties required him not only to make the place, but also to make it safe by timbering as the work of excavation progressed. When the shift-boss came to him, he was engaged in testing the ground to ascertain if it was safe. Having been directed to proceed with the timbering, with the assurance that the ground was then safe and having tested it further, he went to procure the timbers. He was away about three and one-half

hours. In the meantime the drilling had been in progress, and the slacking process had been going on. If he had gone into the place at once and engaged in the work of timbering, he might with some propriety have claimed that he had relied upon the assurance of Johnson that the place was safe; but after the lapse of time during which he was absent—and it does not appear that the defendants were in any way to blame for this loss of time or even knew of it—he, as a reasonable man, with knowledge of the changing conditions, had no right to rely upon the assurance; for, at most, it was made with reference to the conditions as they existed at that time, and did not include conditions as they would exist in the future. Upon his return he went into the place, and, without taking the precautions to make further tests and omitting the precaution, usually taken, of putting up temporary lagging to protect himself, went to work to put in the timbers. The perils were open and obvious, and, as he chose to encounter them without exercising that degree of care and circumspection which the law requires of every reasonable man placed in like circumstances, he assumed the risk, and must be held responsible for his own injury. Under the rule recognized by this court, the defendants were entitled to a nonsuit on this ground. (*Longpre v. Big Blackfoot Milling Co.*, 38 Mont. 99, 99 Pac. 131.)

Again, while under the general rule it is the duty of the master to use ordinary care to furnish the servant a reasonably safe place in which to work, and while this duty cannot be delegated to others so as to free the master from liability (26 Cyc. 1321), in mining and similar industries, one of the necessary incidents of the employment of the servant is the making of the place in which he works. The conduct of industries of this character is dependent upon the doing of work which itself brings about the dangers to which the servant is exposed from time to time as it progresses. Either the master must himself do the work and personally assume all the attendant risk, or he must employ someone else to do it. Therefore the necessity of the case requires the servant, when he enters such

employment, to assume the risk of the same dangers, and this assumption on his part is an incident of the contract. (*Shaw v. New Year's Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.) On this subject Mr. Labatt says: "The rule that it is the duty of a master to exercise ordinary care to provide a reasonably safe place of work for his servants is held not to be applicable to cases in which the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards an increase or diminution of safety. The hazards thus arising as the work proceeds are regarded as being the ordinary dangers of the employment, and by his acceptance of the employment the servant necessarily assumes them. (Labatt on Master and Servant, sec. 269.) In the case of *Finlayson v. Utica Mining & Milling Co.*, 67 Fed. 507, 14 C. C. A. 492, wherein the facts are somewhat similar to those before us, Judge Sanborn, speaking for the court, said: "But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them." After the place has been completed, however, it becomes the duty of the master to use ordinary care to keep it safe, and, under the application of the general rule, he must perform the duty of inspection and repair, from time to time,

to preserve that condition, and he is liable for any injury suffered by his servant through any negligence of duty in that behalf. Illustrative applications of this rule are found in *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273, and *Union Pacific Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433. If, for instance, the employees are engaged in driving a tunnel which requires timbering as it progresses, the risk of the dangers incident to the work as it progresses is assumed by the employees, after the master has discharged the duty of furnishing suitable appliances and materials for the work. Nevertheless the duty to inspect and make repairs in the completed portion appertains exclusively to the master. If Johnson be regarded a mere fellow-servant, and the statement made by him to the plaintiff be construed as the usual direction given to the employees, when occasion required, to proceed with the timbering, then, under the rule as declared in the cases cited above, the injury was the result of one of the ordinary hazards of the business which the plaintiff assumed as an incident to his contract of employment. .

So far we have made no reference to the alleged connection of foreman Ray with the accident. The evidence fails entirely to connect him with it in any way. He was not present at the time. The shift-boss was not in his employ, but in that of the company. No negligence of which the shift-boss may have been guilty is properly imputable to him; for he was merely an intermediate agent who could not be held responsible except for the omission of some duty with which he himself was personally charged.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

JOHNSON, ADMINISTRATOR, APPELLANT, v. BUTTE & SUPERIOR COPPER CO., LTD., RESPONDENT.

(No. 2,817.)

(Submitted April 8, 1910. Decided April 25, 1910.)

[108 Pac. 1057.]

Personal Injuries—Master and Servant—Mines—Negligence of Shift-boss—Liability of Master—Nonsuit—Evidence, How Viewed—Inconsistent Defenses—Pleadings—Admissibility in Evidence—Survival of Actions.

Corporations—Actions—Evidence and Procedure—Rules Applicable.

1. When a corporation is suing or being sued, it occupies the same position as a natural person who is *sui juris*; the same rules of evidence and procedure are applicable.

Pleadings—Inconsistent Defenses.

2. Although the defendant may interpose inconsistent defenses, they must not be so far inconsistent that if the allegations of one are true, the allegations of the other must of necessity be false.

Same—Admissibility in Evidence.

3. Since under section 6565, Revised Codes, pleadings must be verified, admissions in an answer may properly be offered in evidence; and the plaintiff in doing so need not embrace in his offer the entire answer, nor is he estopped from denying or disproving statements contained in the pleading.

Personal Injuries—Mines—Negligence of Shift-boss—Evidence.

4. In an action to recover damages for personal injuries, brought under section 5248, Revised Codes, making the operator of a mine liable for injuries caused by the negligence of a superintendent, shift-boss, etc., plaintiff *held* to have made out a *prima facie* case upon which to go to the jury, upon the questions whether a timber which, in falling, produced the injury, was caused to fall by a shift-boss of defendant company, and whether such person occupied the position of shift-boss.

Same—"Shift-boss"—Definition.

5. The term "shift-boss" as used in section 5248, Revised Codes, means a master workman who directs the operations of a set of men who work in turn with other sets.

Same—Nonsuit—Evidence of Plaintiff—How Viewed.

6. Upon a motion for a nonsuit the plaintiff is entitled to have his evidence considered in the light most favorable to him.

Same—Mines—Negligence of Shift-boss—Liability of Master—Statute—Construction.

7. Under section 5248, Revised Codes, making a mine operator liable for injuries to one of his employees when caused by the negligence, *inter alia*, of a shift-boss, the fact that the negligent act of such shift-boss, which caused the injury, was not connected with the work of directing the men under him, but was committed while doing the work of one of his subordinates, does not relieve the operator from

liability; so long as the act is done in the due course of his employment, the master is responsible, whether done in the discharge of delegable or nondelegable duties.

Same—Survival of Actions.

8. An action for injuries to a servant survives under the statute, and may be prosecuted either by his heirs or personal representatives; but, by whomsoever prosecuted, it is the action which he had for the injuries and which accrued to him at the time he was injured, as distinguished from the damages which his estate suffered by reason of his death therefrom.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Charles J. Johnson, as administrator of the estate of Fred Simila, deceased, against the Butte and Superior Copper Company, Limited. Judgment of dismissal for defendant, and plaintiff appeals. Reversed and remanded.

Messrs. Maury & Templeman and *Mr. J. O. Davies* submitted a brief in behalf of Appellant. *Mr. H. L. Maury* argued the cause orally.

The rules of pleading are general. They are designed to embrace all persons, natural or artificial, capable of suing or being sued. Corporations are bound by the same rules of pleading that bind a natural person. (*Hunt v. San Francisco*, 11 Cal. 258; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 466; 5 Ency. of Pl. & Pr., 60.) For the purposes of an action, and as to all questions of procedure, a corporation is completely assimilated to a natural person. (5 Ency. of Pl. & Pr. 62; *People v. Trinity Church*, 22 N. Y. 44; *Olcott v. Tioga R. Co.*, 20 N. Y. 210, 75 Am. Dec. 393; *Moran v. Long Island City*, 101 N. Y. 439, 5 N. E. 80; *St. Louis Co. v. Sandoval Co.*, 111 Ill. 32; *Harlem v. Emmett*, 41 Ill. 319.)

The district court erred in excluding the allegations of the defendant's answer which were offered in evidence by plaintiff. "Where parties allege matters of fact in their pleadings, these pleadings may be offered in evidence against such parties as admissions of the facts so alleged. Such written statements are admissible on the same principle as oral admissions." (Jones on Evidence, sec. 274; *Granite Gold Min. Co. v. Magin-*

ness, 118 Cal. 131, 50 Pac. 269; *Loftus v. Fischer*, 113 Cal. 286, 45 Pac. 328.) Nor does it matter that the averments in the pleading are on information and belief, for even in another suit this goes merely to the weight of the testimony, and not to its admissibility, and the supreme court of the United States says it is very persuasive evidence. (*Pope v. Allis*, 115 U. S. 370, 6 Sup. Ct. 69, 29 L. Ed. 393; Greenleaf on Evidence, secs. 552, 555; Taylor on Evidence, 7th ed., sec. 1753; *Talbot v. Laubheim*, 188 N. Y. 421, 81 N. E. 163; 1 Thompson on Trials, sec. 197; see, also, *Seattle Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177.)

Does the mining employer's liability Act operate for the benefit of nonresident aliens? Our contention is that it does. There are some Pennsylvania decisions against our position. They are collated in a note to 9 Am. & Eng. Ann. Cas. 1181, but, as is said in a valuable note found there, such a doctrine is now obsolete in the American law. In support of our position we refer the court to *Low Moor Iron Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532, 9 Am. & Eng. Ann. Cas. 1179, and note.

Our contention is that under the strict interpretation of the statute as construed in *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960, the action given by the statute was Simila's own action. The question whether the fact that all the heirs were nonresident aliens would militate against a recovery under the statute can be answered by the statement that our law permits them to inherit from Simila dead, and take his property in preference to all other persons. This statute was for the benefit of Simila, but, if there is a recovery under it, the property goes as the law presumes that he intended for it to go if he died intestate; and if they can inherit from Simila, the fact that they are nonresident aliens is no bar to this action. On the question whether damages in such a case as this should be nominal or substantial, see *Oliver v. Houghton*, 134 Mich. 367, 104 Am. St. Rep. 607, 96 Pac. 434, 3 Am. & Eng. Ann. Cas. 53; *Broughel v. Southern New Eng. Tel. Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404; s. c., 73 Conn. 616, 84 Am.

St. Rep. 176, 48 Atl. 751; *Black v. Griggs*, 74 Conn. 582, 51 Atl. 523; *Missouri K., T. & R. Co. v. Elliot*, 102 Fed. 108, 42 C. C. A. 188.)

Messrs. Kremer, Sanders & Kremer filed a brief in behalf of Respondent. Oral argument by *Mr. Bruce Kremer*.

The test of inconsistency of defenses which renders their union objectionable under the codes of procedure of a few of the states is generally the question whether both may be true or whether if one be true the other must be false, and proof of one would necessarily disprove the other. (*Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125; *Backdahl v. Grand Lodge*, 46 Minn. 61, 48 N. W. 454; *Steenerson v. Waterbury*, 52 Minn. 211, 53 N. W. 1146; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *McCormick v. Kaye*, 41 Mo. App. 263; *Home Fire Ins. Co. v. Decker*, 55 Neb. 346, 75 N. W. 841; *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. 500; *Hollenbeck v. Clow*, 9 How. Pr. 289; *Bryant v. Bryant*, 2 Rob. 612; *Pavey v. Pavey*, 30 Ohio St. 600; *McDonald v. American Mortgage Co.*, 17 Or. 626, 21 Pac. 883; *Snodgrass v. Andross*, 19 Or. 236, 23 Pac. 969; *Lawrence v. Peck*, 3 S. D. 645, 54 N. W. 808; *Lake Shore etc. v. Warren*, 3 Wyo. 134, 6 Pac. 724.)

Under the common law, it was the rule that the plaintiff might use the answer of a defendant as evidence in his favor, but he must take the answer as a whole, and not such parts of it only as were favorable to him. (*Miller v. Avery*, 2 Barb. Ch. (N. Y.) 582; *McNutt v. Dare*, 8 Blackf. (Ind.) 35; *Greenleaf v. Highland*, Walk. (1 Miss.) 375; *Ormond v. Hutchinson*, 13 Ves. 47, 33 Eng. Reprint, 212.) And it is clear that under the reformed code procedure, the common-law rule that one plea could not be given the effect to help or destroy another plea in the same suit is analogously applicable. (*Young v. Katz*, 22 App. Div. 542, 48 N. Y. Supp. 187; *Shrady v. Shrady*, 58 N. Y. Supp. 546.) Where the pleadings of the defendant contained no admission of fact against defendant's interest, the court erred in admitting the pleadings as evidence. (*Illinois Cent. Ry. Co. v. Vaughn*,

33 Ky. Law Rep. 906, 111 S. W. 707.) Under this last doctrine, it appears the offer of appellant was incompetent, for there is no admission against respondent's interest apparent from the defense sought to be introduced.

The test of determining the liability of the master for the negligence of a shift-boss is not from the grade or rank of such vice-principal, but from the character of the act causing the injury. The negligence clearly must be in the performance of a nondelegable duty owing by the master. If the vice-principal in the performance of a delegable duty is guilty of negligence, then the reason for the rule is absent, and there is no liability which attaches to the master. (*Miller v. American Bridge Co.*, 216 Pa. 559, 65 Atl. 1109; *Donnelly v. S. F. Bridge Co.*, 117 Cal. 417, 49 Pac. 559; *Ell v. N. P. R. R.*, 1 N. D. 336, 26 Am. St. Rep. 621, 12 L. R. A. 97; 12 Current Law, 737; *Page v. Pure Food Co.*, 142 Mich. 17, 105 N. W. 72; *Robinson v. Railroad Co.*, 133 Mo. App. 101, 112 S. W. 730; *Perigo v. Indianapolis B. Co.*, 21 Ind. App. 338, 52 N. E. 462; *Dixon v. Union Iron Works*, 90 Minn. 492, 97 N. W. 375; *Baltimore & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Morrison v. San Pedro R. R. Co.*, 32 Utah, 85, 88 Pac. 998; *Stevens v. Strout*, 200 Mass. 432, 86 N. E. 907; *Ricks v. Flynn*, 196 Pa. 263, 46 Atl. 360; *McQueeney v. Chicago M. & St. P. R. R.*, 120 Iowa, 522, 94 N. W. 1124; *Jemming v. Great Northern Ry. Co.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A., n. s., 696; *Riou v. Rockport Granite Co.*, 171 Mass. 162, 50 N. E. 525; *Mulligan v. McCaffrey*, 182 Mass. 420, 65 N. E. 831; *Louisville etc. R. R. Co. v. Isom*, 10 Ind. App. 691, 38 N. E. 423; *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853; *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 5; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Joseph v. Whitney Co.*, 177 Mass. 176, 58 N. E. 639; *Hall v. Wakefield etc.*, 178 Mass. 98, 59 N. E. 668; *Colorado Coal etc. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251.)

The complaint did not state facts sufficient to constitute a cause of action, in that it does not allege that Simila left any

heirs. (See *Webster v. Norwegian etc.*, 137 Cal. 399, 92 Am. St. Rep. 181, 70 Pac. 276; *Chicago etc. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359; *Pizzi v. Reed*, 36 Misc. Rep. 123, 72 N. Y. Supp. 1053; *Chicago etc. Ry. Co. v. Kinnare*, 115 Ill. App. 132; *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726; *Chicago etc. R. Co. v. Bond*, 58 Neb. 385, 78 N. W. 710; *Southern Ry. Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. 1137; *Bartley v. Boston etc. Ry. Co.*, 198 Mass. 163, 83 N. E. 1093.)

While the decisions as to the right of nonresident aliens to maintain an action of this kind are conflicting, we think the following authorities sustain our contention that they have no such right: *McMillan v. Spider Lake etc. Co.*, 115 Wis. 332, 95 Am. St. Rep. 947, 91 N. W. 979, 60 L. R. A. 589; *Brannigan v. Union etc. Co.*, 93 Fed. 164; *Deni v. Pennsylvania Ry. Co.*, 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558; *Zeiger v. Pennsylvania Ry. Co.*, 151 Fed. 348; *Cleveland etc. Ry. Co. v. Osgood* (Ind. App.), 70 N. E. 839; *Roberts v. Great Northern Ry. Co.*, 161 Fed. 239. It is a general rule that express statutory words are necessary to create rights in a nonresident alien. (*Orr v. Hodgson*, 4 Wheat. 453, 4 L. Ed. 613; *Opinion of the Justices*, 7 Mass. 525; *McDonald v. Mallory*, 77 N. Y. 550, 33 Am. Rep. 664; *Rose v. Himely*, 4 Cranch, 279, 2 L. Ed. 620; Story on Conflict of Laws, secs. 7, 20, 98, 278; Endlich on Interpretation of Laws, secs. 166-176.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Fred Simila was employed by the defendant company as a miner, and was working in a shaft at the Black Rock mine, when a piece of timber fell upon him inflicting injuries from which he subsequently died. The administrator of his estate brought this action, and in his complaint alleges that one James Goggin was employed by the defendant company as a shift-boss at the time when and the place where Simila was injured, and that Simila's injuries were occasioned by the negligence of Goggin which caused the timber to fall. The answer of the

defendant admits its corporate existence, and admits that Simila was in its employ; but denies that Simila was injured at all while engaged in the discharge of his duties as a servant of the defendant company. There is a specific denial that Goggin was in fact, or was acting as, a shift-boss for the defendant company, and a denial that through any act of his Simila was injured. There is then a general denial of all the allegations of the complaint not specifically admitted or denied, and certain affirmative defenses are pleaded, the second of which only requires notice here; and the gist of that defense is found in the following declaration: "That the said Simila was injured through the fault and negligence of one of defendant's employees, who was then and there a fellow-servant of the said Simila." Upon the trial the plaintiff offered in evidence the paragraph of the answer from which the above language is quoted, but an objection to the offer was sustained. At the close of plaintiff's case the defendant moved for a nonsuit. The motion was granted, a judgment rendered and entered dismissing the action, and from that judgment the plaintiff appealed. The evidence introduced and offered on behalf of the plaintiff is presented in a bill of exceptions.

1. It is urged that the trial court erred in excluding from the jury's consideration the second affirmative defense set forth in defendant's answer.

This action invokes an Act of the Ninth Legislative Assembly (Laws 1905, p. 51; Revised Codes, sec. 5248), which holds a mining corporation liable for injuries to one of its employees when such injuries are caused by the negligence of a superintendent, foreman, shift-boss, engineer, or craneman. While it is true that the affirmative plea that Simila was injured through the negligence of one of defendant's employees who was then a fellow-servant of Simila would not alone support the plaintiff's allegation that Simila was injured through the negligence of James Goggin, and that Goggin was a shift-boss, it would, however, tend to prove that Simila was injured through the negligence of an employee of the defendant company, and re-

lieve the plaintiff from the necessity of proving that the particular act which caused Simila's injury was a negligent act, and that the person who caused it was an employee of the defendant. If this portion of the answer had been admitted, plaintiff would then have had to prove only: (a) That Simila was injured while in the discharge of his duties as an employee of the defendant; (b) that the particular individual whose act caused the injury was James Goggin; (c) that James Goggin was a shift-boss; and (d) the extent of Simila's injury and the damages resulting therefrom, to make out a *prima facie* case. There is ample evidence in the record to support the first and fourth of these facts.

When a corporation is suing or being sued, it does not occupy a position different from that of a natural person who is *sui juris*. The same rules of evidence are applicable, and, so far as questions of procedure go, the corporation is treated as a natural person. (5 Ency. of Pl. & Pr. 61.) Section 7887, Revised Codes, provides: "Evidence may be given upon a trial of the following facts: * * * The act, declaration or omission of a party, as evidence against such party." The general rule governing the admissibility of pleadings as evidence is stated as follows: "Where parties allege matters of fact in their pleadings, these pleadings may be offered in evidence against such parties as admissions of the facts so alleged. Such written statements are admissible on the same principle as oral admissions." (Jones on Evidence, 274; 16 Cyc. 968; 2 Ency. of Law & Pr. 173; 1 Am. & Eng. Ency. of Law, 2d ed., 719; Abbott's Trial Brief, Civil Jury Trials, 295.) This court has recognized the right of the defendant to interpose inconsistent defenses, under the provisions of section 6549, Revised Codes; but it has never gone to the extent of saying that such defenses may be so far inconsistent that, if the allegations of one are true, the allegations of the other must of necessity be false. Generally speaking, our Code requires pleadings to be verified (Revised Codes, sec. 6565); but, in permitting a defendant to set forth in his answer as many defenses as he has,

it was never intended to sanction or encourage perjury. In states where the pleadings are required to be verified, the general rule is: "The defendant may plead inconsistent defenses, provided they be not so incompatible as necessarily to render one or the other absolutely false." (*Clarke v. Lyon County*, 7 Nev. 75; *Seattle Nat. Bank v. Jones*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; 1 Ency. of Pl. & Pr. 857; Bliss on Code Pleading, sec. 343.) There are some authorities which hold that if an answer contains inconsistent defenses, as, for instance, a denial that the plaintiff was injured through the negligence of anyone, and an affirmative plea that he was injured through the negligence of a fellow-servant, then the affirmative plea is not admissible in evidence to prove the issue made by the complaint and the denial, as the practical effect of this would be to deny to a defendant the right to interpose such inconsistent defenses. (Pomeroy's Remedies and Remedial Rights, 2d ed., 724; 1 Elliott on Evidence, sec. 236.) But so far as we are able to determine from the means at hand, these authorities are treating of cases arising in states where the pleadings are not required to be verified. It appears to us to be the acme of absurdity to say that the casual admission of a defendant, made on the street, may be put in evidence against him, but that his solemn admission, made deliberately and under oath, in a pleading, which calls for a true statement of the facts, may not be used against him. If by the second affirmative defense the defendant sought to charge that Simila's injuries were caused by a fellow-servant, it would seem that it would have been sufficient to say so, without volunteering the information that the act which caused the injury was a negligent one. Adopting the rule as stated in *Clarke v. Lyon County*, above, it is manifest at once that the reason for the contention made by Pomeroy and Elliott fails when applied to the pleadings under our Code, and that there is not any reason whatever why admissions in a pleading ought not to be used in evidence against the pleader.

In passing, we may say that it is very doubtful whether the answer in this case is open to adverse criticism. The denial is

that Simila was injured "while engaged in his duties as defendant's servant."

It was not any objection to the offered evidence that the plaintiff did not embrace in his offer the entire answer. Section 7871, Revised Codes, provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence." In Abbott's Trial Brief, Civil Jury Trials, 299, the rule is stated as follows: "A party may read in evidence a mere extract from his adversary's pleading, however brief, provided he does not omit a part of a sentence or clause which qualifies that part which he reads, so as to pervert the sense or render it uncertain." From the allegations of this affirmative defense, plaintiff was seeking to show that Simila's injury was caused by a negligent act, and that the person whose negligence caused the injury was an employee of the defendant company. The plaintiff would not have been bound by the allegation that the person who caused the injury was a fellow-servant of Simila. We quote again from Abbott's Trial Brief, 298, the following: "A party who puts in evidence his adversary's pleading is not thereby estopped from denying or disproving statements contained in it."

Our conclusion is that the trial court erred in excluding the evidence offered.

2. But counsel for respondent insist that, assuming this evidence had been admitted, plaintiff would still have failed to make out a *prima facie* case upon which to go to the jury. Simila and five other men were engaged in sinking a shaft. They were seventy-five or eighty feet below the 1,200-foot level. They had drilled holes preparatory to blasting, and Goggin had taken their tools to a place of safety, eighteen or twenty feet above where the men were working. The timber which

struck Simila was used by the defendant to protect the regular sets of timbers from the effect of the blast, and before it fell it was resting upon the mining timbers, fifteen or twenty feet above the bottom of the shaft. Simila was bending over cleaning out the drill holes preparatory to charging them, when this piece of timber fell and struck him on the head, inflicting injuries from which he died on the following day. There was not anyone who saw the timber when it commenced to fall; but just before it struck Simila, Goggin called out from up the shaft, "Look out below!" There is some evidence that at that time Goggin himself was fifteen or twenty feet above the bottom of the shaft. By a process of elimination, plaintiff sought to show that Goggin was the only person who could have caused the timber to fall; and this he did by showing the whereabouts of every other man employed in or about the shaft at the time the accident occurred, and by showing that there was not any other employee of the defendant company near the timber when it fell. There is some evidence, however, that soon after the accident the cage came down the shaft and Goggin was on the cage. This might tend to show that he could not have been near the timber when it fell; but the weight of the evidence was for the jury. It seems to us that this is sufficient circumstantial evidence to make out a *prima facie* case identifying Goggin as the person who caused the timber to fall. It appears reasonably certain that Goggin was the only person who could have explained the circumstances which caused the timber to fall, and he had died before the case was tried.

3. It became, then, incumbent upon the plaintiff to show that Goggin was a shift-boss at the time of the accident. The evidence tends to show that Davis was superintendent at the mine; that McLeod was foreman, and that McLeod visited the place where this sinking was in progress, at least once during every shift and stayed about ten minutes each time. Touching the character of Goggin's employment, the witness Devaney testified: "Mr. Goggin had charge of the work when the foreman

was away. Five men were under him. I do not remember how long he had charge of the men. Mr. Goggin gave orders to the men, as to their work, when the foreman was not present, if any orders were given. That had been going on all the time I was there. I could say that I had been there as much as a month, and a little more when this injury took place. Of these six men, when the foreman was up and not present, Mr. Goggin was the boss. * * * Goggin and I were engaged in ordinary mining together as partners. Mr. Goggin and I worked as partners while the others worked as partners on that shift. We were all engaged in the same character of work. The work that we were engaged in was sinking. * * * Q. Mr. Devaney, Mr. Goggin was there working as an ordinary miner. You say he was bossing while McLeod was not there. He was pusher, was he not? A. Supposed to be; yes, sir. A pusher does the work of a miner, right there with us; handles tools and mines, and supposed to work a little harder than the rest of us. I am familiar with the custom of the camp down here for seventeen years. It is a custom of miners recognized by the Butte Miners' Union. When I said he was bossing, I mean that he set the pace and was pusher on that shift. He did the work with me. * * * As to whether or not he was bossing on that shift, I will say that he would dictate to us what to do. He dictated to the other men on that shift what they should do. When he was dictating what they should do, they were doing the work for the Butte and Superior."

Fillerup, a witness for plaintiff, testified to substantially the same thing, and, in addition that the other men obeyed the orders given by Goggin and would have lost their positions had they refused to do so.

The witness Johnson testified as follows: "Mr. Goggin was bossing on that shift on which I was working, Jim Goggin. I worked there three months. Mr. Goggin had been bossing there during all of that time. I do not know just exactly how long I had worked there after Simila was hurt, but about five or six days after. * * * Mr. Goggin gave the orders to the

other five men there that were on that shift. The balance of the men carried out the orders as he gave them; that was before Simila died. * * * Well, Mr. Goggin said what we were going to do in that work. Then he helped us to do it. He helped us do the work with Devaney as his partner."

At the time the Act of 1905 was under consideration by the legislature, the word "shift-boss" had a well-defined and well-understood meaning. It is a compound word, formed by uniting the words "shift" and "boss." The word "shift," as used in that Act, means "a set of workmen who work in turn with other sets, as a night shift" (Webster's International Dictionary); or the time during which a particular set of men work. The noun "boss" means a master workman or superintendent, a director or manager. (Webster's International Dictionary.) "A boss is one who oversees or gives direction." (*Applebee v. Albany Brewing Co.*, 12 N. Y. Supp. 576.) The verb "boss" means to hold mastery over, to direct or superintend. (Webster's International Dictionary.) The word "shift-boss," as used in the Act of 1905, means a master workman who directs the work of the set of men engaged upon a particular shift.

It is the rule in this state, recognized for many years, that upon a motion for a nonsuit the evidence will be deemed to prove every fact which it tends to prove; that is to say, the plaintiff is entitled to every legitimate inference which can be drawn from the evidence, or, to state the same thing in another way, the plaintiff is entitled to have his evidence considered in the light most favorable to him. If, then, the evidence which is set forth above tends to show that Goggin was placed in a position where his duties included the giving of directions to the men on his shift, the character of his employment was a question of fact for the jury to resolve, and that, too, without reference to the particular designation given him by his master or by other workmen; for, if he exercised the authority of a shift-boss with the consent of his master, he was one in fact, whether he was called a miner, a pusher, a superintendent, or a

shift-boss. As touching the character of Goggin's employment, we think the evidence sufficient to go to the jury.

4. A most serious question is presented upon this appeal, by the contention made by counsel for respondent that, conceding Goggin was the employee whose negligent act caused the injury to Simila, and conceding further that in giving orders to the other men engaged with him Goggin was a shift-boss within the meaning of the statute, still the evidence shows that at the time the timber was dislodged Goggin must have been engaged in the work of an ordinary miner, namely, removing the tools to a place of safety. We agree with counsel that this is the only fair inference deducible from the evidence, and this fairly presents the question: May the mining company be held responsible, under the Act of 1905, for damages resulting from the negligence of a shift-boss, when such negligent act was not connected with the work of directing the men under him, but was committed in doing the work of an ordinary miner?

Counsel for respondent cite cases which they maintain tend to support their theory that "the negligence clearly must be in the performance of a nondelegable duty owing by the master. If the vice-principal in the performance of a delegable duty is guilty of negligence, then the reason for the rule is absent, and there is no liability which attaches to the master." One of these cases is *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; but the decision in that case does not have any bearing upon the question now before us, as the court held that the evidence was sufficient to go to the jury, as tending to show that the negligent act was that of a superintendent in the course of his superintendence. Another case cited is *Colorado Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251. This case was decided upon the principles of the common law and the provisions of the coal mines Act, approved February 24, 1883 (Laws 1883, p. 102), as amended by the Act of April 8, 1885 (Laws 1885, p. 134). The principles of the common law and the provisions of the Colorado Act are so far different from our Act of 1905 that the Colorado decision cannot possibly throw any light upon the question before us.

The other cases relied upon are all from Massachusetts, beginning with *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4, and concluding with *Hall v. Wakefield & S. St. Ry. Co.*, 178 Mass. 98, 50 N. E. 668. An examination of these cases discloses that every one was decided under the Employer's Liability Act of Massachusetts, approved May 14, 1887 (Laws 1887, c. 270), which holds the master liable for injuries sustained by a servant: "(2) By reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." Under that statute the Massachusetts court has uniformly held that "the employer is not answerable for the negligence of a person intrusted with superintendence, who at the time of and in doing the act complained of is not exercising superintendence, but is engaged in mere manual labor, or the duties of a common workman." It would seem difficult to understand how any different conclusion could be drawn from the plain language of that statute; and it is equally difficult for us to apply the doctrine of those cases to the present action, which invokes our Liability Act of 1905, which omits the very pertinent words found in the Massachusetts Act, viz., "and exercising superintendence." Under the Massachusetts statute, in order to hold the master liable for the negligence of the superintendent, "the negligence complained of must occur not only during the superintendence, but substantially in the exercise of it." (*Fitzgerald v. Boston & A. R. Co.*, 156 Mass. 293, 31 N. E. 7.) The Employer's Liability Acts of England, New York, and Alabama contain the same provision as that quoted from the Massachusetts statute, and the courts construing these Acts have experienced great difficulty in determining whether a particular act was, or was not, done in the exercise of superintendence. Under the rules of the common law this plaintiff would not have any standing in court upon the showing made, for the negligence of Goggin would be held to be the negligence of a fellow-servant, for which the master is not liable. (*Goodwell v. Montana Central Ry. Co.*, 18 Mont. 293, 45 Pac. 210.)

In enacting the statute of 1905, the legislature must have had some definite purpose in view. We can gather the legislative intent only from the language employed and the evils which it was sought to cure. It is manifest at once that one purpose was to deprive the master of the defense of negligence of a fellow-servant, when the negligent act was that of a shift-boss; and the fact that the English, Massachusetts and Alabama statutes had been in force for many years before 1905, and that difficulties had been encountered in applying them, the omission by our legislative assembly of the words found in those statutes is at least significant. If our legislature had intended that the only negligent act of a shift-boss for which the master will be held liable is one done in exercising direction or control over the men under him, it would have been an extremely simple matter to have said so by adding the words of the English, Massachusetts, New York, or Alabama statutes, or other words of like import. But this was not done. Our legislature boldly declares that the mining company is liable for the negligence of a shift-boss which causes injury to any employee, if the employee himself was without contributing negligence on his part. If the legislature did not intend that the courts should accept and act upon this statute as it is written, then the legislature, and not the courts, should amend the Act and make it clearly express the legislative will.

It would be idle to say that by this construction the mining company would be liable for the negligent act of a shift-boss when not engaged in the discharge of his duties, for the all-sufficient reason that when not on duty he is not a shift-boss. - He is only a shift-boss when on shift. If a mining company sees fit to impose upon an employee the duties of a shift-boss, and in addition thereto duties which are usually performed by an ordinary miner, it cannot be permitted thereby to change the grade of employment, or to so far confuse the character of employment that those for whose benefit the statute was enacted will be unable to determine when they are, or are not, afforded the protection which the law intended. To say that the mining company is only responsible for such negligent acts of its shift-

boss as come within the definition of nondelegable acts or duties, would render the statute a dead letter, for in the absence of statute the master would be liable for such acts, and if his liability is now precisely the same, and he can invoke the same defenses as before, then our legislature acted in vain in attempting to afford protection to workmen which they did not enjoy before. But this was not the purpose of the Act. The legislature intended that the mining company should be liable for the negligent acts of its shift-boss, whether the acts were done in the discharge of delegable or nondelegable duties, so long as they were done in the due course of his employment, whatever that might be.

While this action is prosecuted by the administrator, it is in fact Simila's action—the common-law action which he had for the injuries which he received, and which accrued to him at the time of his injuries, and remained available to him until the instant of his death. (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960.) By virtue of our survival statute, the right of action did not cease at the death of Simila, but may be prosecuted either by his heirs or personal representatives; but, by whomever prosecuted, it is still the action which Simila had. Whether his heirs, if any there be, have a cause of action under the provisions of our statute, modeled after Lord Campbell's Act, for damages which they sustained, as distinguished from the damages which he or his estate suffered, need not be considered here. The only reason for invoking the statute of 1905 is to prevent the defendant from interposing the defense that Simila was injured through the negligence of a fellow-servant, conceding that the person who caused the injury was a shift-boss.

We think the case should have gone to the jury for a determination upon the merits.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied May 18, 1910.

DA RIN, ADMINISTRATOR, RESPONDENT, v. CASUALTY COMPANY OF AMERICA, APPELLANT.

(No. 2,820.)

(Submitted April 7, 1910. Decided April 25, 1910.)

[108 Pac. 649.]

Accident Insurance—Notice and Proof of Death—Evidence—Sufficiency—Waiver—Exposure to Danger—Attempt to Save Life.

Accident Insurance—Notice and Proof of Death.

1. While the giving of notice and the furnishing of proof of death, called for by the provisions of an accident insurance policy, are distinct and separate acts, proof of death, when seasonably made, may also serve the purpose of notice; but a mere informal notice does not ordinarily supply the place of formal proof.

Same—Proof of Death—Evidence—Nature and Sufficiency.

2. The proof of death required to be made by the terms of a policy of accident insurance need not consist of formal depositions or sworn statements of eye-witnesses, but evidence in any form, when substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liabilities under his contract, is sufficient, and it is for the court, and not for the insurer, to say whether it gives substantially the information stipulated for in the policy.

Same—Notice and Proof of Death—Sufficiency—Waiver.

3. When notice of a casualty and proof of resulting death are incorporated in the same communication to the insurer, and the proof of the cause of death, with the attendant facts, meets all the requirements of the policy, except that the statement is not as full as it might be, the failure of the insurer to demand more explicit proof is a waiver of his right to thereafter object to its sufficiency.

Same—Attempt to Save Life—Negligence.

4. The law will not impute negligence to one who, in an attempt to save human life, is injured, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons.

Same—Attempt to Save Life—Exposure to Unnecessary Danger—Jury Question.

5. *Held*, that the question whether the death of a miner who, while attempting to rescue a fellow-workman who had been overcome by noxious gases, was himself overcome and died from the effects of the inhalation of such gases, resulted from an unnecessary exposure to danger so as to absolve the defendant company from liability under a provision in its contract of insurance, was one for the jury.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Peter Da Rin, administrator of Joseph Battista Pinazza, against the Casualty Company of America. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Messrs. Kremer, Sanders & Kremer submitted a brief in behalf of Appellant. *Mr. Louis P. Sanders* argued the cause orally.

It is a primary law of insurance that notice and proof are not the same, that they cannot be considered as a combined condition, but are separate and distinct conditions precedent to the right of recovery on a policy where they are set out as such. (2 May on Insurance, 4th ed., sec. 461; 4 Joyce on Insurance, sec. 3286; *O'Reilly v. Guardian M. L. Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151; *Germania F. Ins. Co. v. Columbia Encaustic Tel. Co.*, 11 Ind. App. 385, 39 N. E. 304; *Insurance Co. v. Brimm*, 111 Ind. 281, 12 N. E. 315; *Pickel v. Ins. Co.*, 119 Ind. 291, 21 N. E. 898; *Cargell v. Millers' etc. Ins. Co.*, 33 Minn. 90, 22 N. W. 6; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Burlington Ins. Co. v. Ross*, 48 Kan. 228, 29 Pac. 469; *State Ins. Co. of Des Moines v. Belford*, 2 Kan. App. 280, 42 Pac. 409; *Westchester Fire Ins. Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029; *Hosley v. Black*, 28 N. Y. 438; *Bogardus v. Insurance Co.*, 101 N. Y. 335, 4 N. E. 522; *Fox v. Davidson*, 36 App. Div. 159, 55 N. Y. Supp. 524; *Armstrong v. Insurance Co.*, 130 N. Y. 565, 29 N. E. 991; *Sullivan v. Insurance Co.*, 34 App. Div. 128, 54 N. Y. Supp. 629; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185.)

We are aware of that class of decisions in insurance cases that will be urged by the respondent in support of his contention that one notice can constitute proof, etc. These cases are easily differentiated from the case at bar and those cases heretofore cited. Respondent's cases will contain some method of waiver, either by the acts of the insurer after notice and proof have been forwarded to it, or by some act of the insurer in taking part in some autopsy or coroner's inquest, or in the

preparation of some of these proofs. In the case at bar there were no overt acts on the part of insurer which would bring it within the terms of these decisions on waiver. It was absolutely silent in the matter and silence is not waiver. (Joyce on Insurance, sec. 3361; *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151; *Everett v. Niagara Ins. Co.*, 142 Pa. 322, 21 Atl. 817; *Beatty v. L. C. Mut. Ins. Co.*, 66 Pa. 9, 5 Am. Rep. 318; *Cornell v. Milwaukee Mut. F. Ins. Co.*, 18 Wis. 388; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Diehl v. Adams Co. Mut. Ins. Co.*, 58 Pa. 452, 98 Am. Dec. 302; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560, 29 N. E. 991; *Home Fire Ins. Co. v. Driver*, 87 Ark. 171, 112 S. W. 200.) Where a waiver is relied upon, it must be pleaded. (May on Insurance, sec. 589; *Western Home Ins. Co. v. Thorp*, 48 Kan. 239, 28 Pac. 991; *Gillett v. Burlington Ins. Co.*, 53 Kan. 108, 36 Pac. 52; *Long Creek Bldg. Assn. v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366; *Westchester Fire Ins. Co. v. Coverdale*, 9 Kan. App. 651, 58 Pac. 1029; *Deming Inv. Co. v. Fire Ins. Co.*, 16 Okl. 1, 83 Pac. 918, 4 L. R. A., n. s., 607; *Parsons v. Grand Lodge A. O. U. W. of Iowa*, 108 Iowa, 6, 78 N. W. 676.)

The rule governing a voluntary exposure to unnecessary danger is tersely expressed as follows: "If the danger is one that a reasonably prudent man ought to know, voluntary exposure thereto will come within the exception. If, however, the danger or hazard is such as would not be visible to an ordinarily prudent person, then there is no voluntary exposure to unnecessary danger." (1 Cyc. 261, and numerous cases cited.) The courts in many instances except from the rule of "voluntary exposure to unnecessary danger" cases where one is injured in attempting to rescue others in supposed danger. (1 Cyc. 261.) But where the act of the rescuer is one of wanton recklessness and disregard of danger, they hold that by so acting the rescuer voluntarily exposed himself to unnecessary danger. (5 Thompson on Negligence, 2d ed., p. 85, and cases cited; *Deloy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108.)

In behalf of Respondent, there was a brief by *Mr. Jesse B. Roote*, and *Mr. James E. Murray*, and oral argument by the latter.

The respondent maintains that the report of accident is both notice and proof, combined in one paper. (*Farmers' M. F. I. Co. v. Moyer*, 97 Pa. 441, 448.) The contract of insurance here may be divided into two parts—first, for accidents which result in a disability, and, second, for accidents which result in death. In this case the accident resulted in immediate death, and created a claim for a death loss. If the accident had resulted in an injury which later, say two weeks, resulted in death, then no doubt a notice and the proofs were necessarily separate and distinct, but where accident and death are simultaneous the necessity for separate notice and proof disappears. This is well illustrated in the case of *McFarland v. United States Mut. A. Assn.*, 124 Mo. 204, 27 S. W. 436. The policy in that case is different from the policy here, but the reasoning of the court will apply at bar. (*Parks v. Anchor etc. Ins. Co.*, 106 Iowa, 402, 76 N. W. 743.)

Where the contents of the proofs are not specified by the policy, all that is necessary is that the proofs reasonably inform the insurer of its liability. (*Brown v. Fraternal A. Assn.*, 18 Utah, 265, 55 Pac. 63; *Van Eman v. Fidelity & C. Co.*, 201 Pa. 537, 51 Atl. 177; *Charter Oak etc. Co. v. Rodel*, 95 U. S. 232, 21 L. Ed. 433; *Phoenix Ins. Co. v. Rad Bila etc.*, 41 Neb. 21, 59 N. W. 752; *Parks v. Anchor etc. Co.*, 106 Iowa, 402, 76 N. W. 743; *Pringle v. Des Moines I. Co.*, 107 Iowa, 742, 77 N. W. 521; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 23; *Walsh v. Washington etc. Co.*, 32 N. Y. 427, 440; *Connecticut etc. Co. v. Akens*, 150 U. S. 467, 14 Sup. Ct. 155, 37 L. Ed. 1148.)

The insurer is not the sole judge of the sufficiency of proofs. (*Noyes v. Commercial etc. Assn.*, 190 Mass. 171, 76 N. E. 665; see, also, *Taylor v. Aetna etc. Co.*, 13 Gray, 434.) If the insurer denies all liability on grounds other than failure of proof, failure of proof is no defense. (*Orient Ins. Co. v. Clark*, 22 Ky.

Law Rep. 1066, 59 S. W. 863; *McComas v. Covenant etc. Co.*, 56 Mo. 573; *Tayloe v. Merchants' etc. Co.*, 50 U. S. 390, 13 L. Ed. 187; *Omaha etc. Co. v. Dierks*, 43 Neb. 569, 61 N. W. 745; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869.)

The act of Pinazza in attempting to rescue his fellow-servant was a necessary act, and not voluntary exposure to unnecessary danger. (*Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *Tucker v. Mutual B. L. Co.*, 50 Hun, 50, 4 N. Y. Supp. 505; *Williams v. United States Mut. A. Assn.*, 14 N. Y. Supp. 728; s. c., 82 Hun, 268, 31 N. Y. Supp. 343; *Matthes v. Imperial A. Assn.*, 110 Iowa, 222, 81 N. W. 484; *Employers' Liability etc. Co. v. Anderson*, 5 Kan. App. 18, 47 Pac. 331; *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 95 Am. St. Rep. 374, 59 S. W. 7; *Smith v. Aetna etc. Co.*, 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368, 56 L. R. A. 98.) The words "voluntary exposure to unnecessary danger" mean an exposure willingly undertaken of a hazard which necessity does not require. (*United States Mut. A. Assn. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453.)

Negligence on the part of deceased is no defense. The supreme court of Wisconsin, in *Schneider v. Provident Life Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157, discusses at length the question of negligence of the insured barring a recovery, and to this case attention is respectfully called. (See, also, *United States Mut. A. Assn. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Smith v. Aetna etc. Co.*, 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368, 56 L. R. A. 271; *Angier v. Western Assur Co.*, 10 S. D. 82, 66 Am. St. Rep. 685, 71 N. W. 761.) The burden of proving negligence is upon the defendant. (*Smith v. Aetna etc. Co.*, 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368, 56 L. R. A. 271.) Voluntary exposure to unnecessary danger is an affirmative defense, and the defendant must allege this, and prove it by a preponderance of the evidence. It must prove that there was no necessity for the action of Pinazza. (*Badenfeld v. Massachusetts Mut. A. Assn.*, 154

Mass. 77, 27 N. E. 769, 13 L. R. A. 263; *Jones v. United States Mut. A. Assn.*, 92 Iowa, 652, 61 N. W. 485; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Meadows v. Pacific etc. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578; *Williams v. United States Mut. A. A.*, 82 Hun, 268, 31 N. Y. Supp. 343; *Payne v. Fraternal A. A.*, 119 Iowa, 342, 93 N. W. 361.)

The record shows conclusively that Pinazza was overcome by gas and that his death was due to an accident. If Pinazza died by reason of some disease, as heart failure, and not by reason of the accident alleged, the burden is on defendant to so prove. (*Payne v. Fraternal A. A.*, 119 Iowa, 342, 93 N. W. 361; *Meadows v. Pacific etc. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427, 31 S. W. 578.) The burden of proof is on defendant to show that death was due to an excepted cause. (*Anthony v. Mercantile M. A. A.*, 162 Mass. 354, 44 Am. St. Rep. 367, 38 N. E. 973, 26 L. R. A. 406.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by the plaintiff, as administrator of Joseph Battista Pinazza, deceased, to recover on a policy of insurance for the death of his intestate, caused by accident. On May 20, 1908, one Labek, a miner working underground in a drift in one of the mines of the Boston and Montana Consolidated Copper and Silver Mining Company (hereafter referred to as the mining company), in Silver Bow county, was overcome by gas. Upon discovery of his condition, through the outcry of his companion, Pinazza, with others who were working with him near by, ran to his assistance. Pinazza preceded the rest, and while attempting to drag the injured man out into the other workings where the air was better and he could have relief, he was himself overcome, and thereafter, on the same day, died from the effects of the inhalation. Prior to that time, and for the benefit of the miners and others in its employ, including Pinazza, the mining company had negotiated with the defendant a policy of insurance, under the terms and stipulations of which the latter

insured these employees against bodily injuries, whether resulting in death or not, "suffered directly through external, violent and accidental means, on account of an accident occurring during the term" of the policy, by reason of the business operations therein stated, and "while on the premises of the company or upon the ways immediately adjacent thereto, provided for the use of such employees or the public." The policy, among other special agreements, contains the following:

"(A). If the death of any employee shall so result within ninety days from such injuries, independently of all other causes, the company will pay to the assured a sum equal to fifty-two weeks' wages, computed at the rate per week received by such injured employee at date of accident; but such sum shall not exceed one thousand five hundred dollars."

"(F). Recovery may be had for the benefit of the same employee under one of the foregoing clauses only as respects the result of injuries caused by any one accident; and in no event shall the company's liability for a casualty resulting in injuries to or death of several persons, exceed ten thousand dollars. * * *

"(G). It is further understood and agreed that injuries, fatal or otherwise, resulting from poison or anything else accidentally absorbed or inhaled while actually engaged in operations connected with business of the assured, are covered by this policy."

It also contains the following general agreements:

"GENERAL AGREEMENTS.

"1. The assured, upon the occurrence of a casualty covered hereby shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company's duly authorized local agent or to its home office in New York City; and shall also give immediate written notice, with full particulars, of any and all claims which shall be made on account of a casualty covered hereby; and shall at all times render to the company all possible co-operation and assistance.

"2. Affirmative proof of death, of loss of limb or sight, or of duration of disability must be furnished to the company

within two months from the time of death, loss of limb or sight, or termination of disability. Legal proceedings for recovery hereunder may not be brought within three months from date of filing final proofs at the company's home office; nor brought at all unless begun within six months from time of death, loss of limb or sight, or termination of disability. * * *

"10. This policy does not cover disappearance, or suicide—sane or insane; nor injuries of which there is no visible mark upon the body, nor injuries resulting from voluntary overexertion, exposure to unnecessary danger or violation of law," etc.

There was indorsed upon it the following, as an amendment to paragraph 10 of the General Agreements: "Indorsement: It is understood and agreed that the clause in paragraph 10 of the General Agreements reading 'nor injuries of which there is no visible mark upon the body,' is not to apply to death or permanent disability, resulting directly from an accident covered by this policy, provided that affirmative proof is given to the company that said death or permanent disability was the direct, sole result of an accident as aforesaid."

The policy was taken by the mining company in its own name, but the premium paid for it was obtained by deductions by the mining company from the monthly wages of all the employees for whose benefit it was negotiated. These deductions were made by their consent. At the time of his death, Pinazza had been receiving wages at the rate of \$28 per week. It is alleged in the complaint that the death of Pinazza occurred during the term of the policy; that the mining company, on behalf of deceased, and on or about May 23, 1908, gave to the defendant written notice of the casualty, and furnished to it affirmative proof of the resulting death, with the fullest information concerning it, according to the terms of the contract, using for that purpose a blank form supplied by the defendant, that the mining company and the plaintiff have performed all the conditions of the contract to be by them performed, and that under the agreements and stipulations contained in it, there is due and owing to the plaintiff \$1,456, no part of which has been paid,

though demand has been made. Judgment is demanded for this amount.

The answer of the defendant, after denying generally the material allegations of the complaint, alleges, as affirmative defenses, the following: (a) That the plaintiff failed to comply with clause 1 of the General Agreements; (b) that he likewise failed to comply with clause 2 of these agreements; (c) that the deceased exposed himself to unnecessary danger, thus causing his own death; and (d) that the plaintiff failed to comply with paragraph 10 of the General Agreements, as amended by the clause indorsed upon the policy. There was issue by reply. The plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

Though the policy in terms designates the mining company as the insured, no question is made but that the defendant is directly liable to the plaintiff, if he, or anyone else on behalf of the deceased, furnished the proof required by the terms of the policy. The principal contention is that the evidence is insufficient to justify the verdict, in that it does not show that affirmative proof that the death of Pinazza was the direct, sole result of poisoning by an inhalation of poisonous gas was furnished to the defendant within two months, or at all.

The defendant did not introduce any evidence. Plaintiff's evidence tends to show the following: On the next day after the death there was delivered to the local agent of the defendant, signed by the foreman of the mining company, a report on the death of Pinazza, giving the name and address of the mining company, the name, address and occupation of the deceased, together with the weekly rate of wages paid him, the place where the accident occurred, the name of the foreman in charge, the hospital call made, the name of the attending physician, the alleged cause of the death, and the names and addresses of all persons who witnessed the accident. This was made upon a printed blank furnished by the defendant. The cause of the death is stated as follows: "Battista Pinazza went to 955 to help

rescue a man who was knocked out by gas, and inhaled gases which caused his death." There is no evidence as to how or upon what information this report was made up other than the following: Mr. Burns, a clerk of the mining company, testified: "What I have to do with the accident, part of it, is to receive the report of the accident that comes from the different timekeepers at the mines, enter them in this book [record of accidents], and turn them over to whoever is in charge—the superintendent—for his signature. * * * The original is sent to their [defendant's] agents here, and the copy that I keep placed on file." Thomas, one of the local agents of the defendant, stated: "I said I received a report similar to this; I never received any other report than this, in connection with this, to my knowledge or recollection. I believe this was the only report served on me; that is to the best of my recollection." There is not any evidence tending to show that there was any communication of any kind between the defendant and the mining company, or the plaintiff, after the delivery of the report. From this evidence it is a fair inference that the report was made up by Burns, the clerk, from the statements of the timekeeper, upon one of a supply of blanks kept for that purpose, and that it was signed by the foreman as a part of the routine business of the office. It is conceded that the report was a sufficient notice of the death. The question, therefore, is whether it is sufficient as affirmative proof of the cause of death, required by paragraph 2 of the General Agreements and the indorsement amendatory of paragraph 10.

The giving of the notice and the furnishing of proof are distinct and separate acts. Proof of death, seasonably made, may serve the purpose of both notice and proof, because the formal statement of facts made in the proof ordinarily must include all the information imparted by the notice. But a mere informal notice does not ordinarily supply the place of formal proof. (*O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169, 19 Am. Rep. 151; *May on Insurance*, sec. 460; 4 *Joyce on Insurance*, sec. 3285.) However the two acts may be done, whether conjunc-

tively or separately, both are conditions precedent, which must be complied with in order to render the insurer liable, unless there is an express or implied waiver. (4 Joyce on Insurance, sec. 3286.) In the absence of an express stipulation as to the form and character of the evidence which must be furnished, it is difficult to determine in a given case whether the provision as to proof has been complied with. The determination of the question, however, does not rest with the insurer alone. Mr. Joyce, speaking on this subject, says: "The provision requires such notice and proof as may appear to a court to be in accordance with the rules of evidence; and, if such notice and proof have been given, then there has been a compliance with the provision. The question, then, as to what is due proof is to be determined by the court according to the rules of evidence, and not by the insurers." (Section 3290.) This statement seems to imply that the evidence furnished must be such as would be adjudged by a court admissible under the rules applicable in judicial proceedings. To the same effect is the statement of the rule in *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434, and in *O'Reilly v. Guardian Mut. Life Insurance Co.*, *supra*. In the latter case it is said: "The condition can only be performed by furnishing evidence in some form of the truth of the fact stated in the notice, and upon which the right of action depends. It need not be that full, clear and explicit proof which would be required upon the trial of an issue upon the question, but it must be such reasonable evidence as the party can command at the time, to give assurance that the event has happened upon which the liability of the insurers depends. * * *

The purpose of the condition is that the insurer may be able intelligently to form some estimate of his rights and liabilities before he is obliged to pay, and some proof must be exhibited." Our statute (Revised Codes, sec. 5628) declares: "When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time." While this provision,

when read in connection with the preceding and following sections, would seem to apply to fire insurance policies exclusively, it applies as well to life and accident insurance. (Revised Codes, sec. 5249.)

The rule stated by the foregoing authorities is vague and indefinite, and the provision contained in the statute is not less so; nevertheless the evident purpose of the legislature in enacting it was to dispense with the necessity of the production, in the first instance, of formal depositions or sworn statements of eye-witnesses, and declare evidence in any form sufficient when it is substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liabilities under his contract, and is the best evidence which the insured has in his power at the time. It makes it entirely clear that any succinct and intelligent statement, giving the information called for by the stipulation in the policy, whether verified or not, or whether by eye-witnesses or not, is sufficient to put the insurer upon inquiry to determine whether he is liable. It recognizes evidence other than that which falls within the range of judicial evidence, as defined in section 7844, Revised Codes, such as the sworn testimony of witnesses, delivered orally or by deposition, or, in some cases, by affidavit or the like. It includes evidence of any degree which would tend to establish a disputed fact; and the court must in each case determine whether, in whatever form it may be furnished, it gives substantially the information stipulated for.

The report set forth in the statement herein was furnished to the defendant on the next day after Pinazza died. The statement contained in it, touching the cause of his death and the attendant circumstances, is brief, and does not enter into particulars, yet it contains the information that he died from inhaling poisonous gas while in the company's mine. It is not sworn to; but this formality was not required. It purports to be a statement of an eye-witness, and there is no suggestion in the pleadings or the evidence that it is not a true statement. It tends to show that death was caused solely and exclusively by

the inhalation of poisonous gas, because the statement is: "He inhaled gases which caused his death." This direct statement, while not sufficient to establish the fact of death and the cause of it in a judicial investigation, because not sworn to, was nevertheless affirmative evidence of the fact, and was sufficient to put the defendant on inquiry to determine its rights in the premises. If it desired evidence more conclusive because entering more into detail, it should have called for it without unreasonable delay. The names and residences of all the witnesses and of the attending physician were stated; thus the opportunity was afforded to the defendant, if such course was deemed necessary. Having made no objection, it must be deemed to have waived its right to demand more explicit proof. (Revised Codes, sec. 5630.) We do not mean to be understood as saying that, if the report had amounted to nothing more than a mere notice of the death, any duty would have rested upon the defendant to demand the affirmative proof required by the policy. Mere silence does not under such circumstances amount to a waiver on the part of the insurer. (*O'Reilly v. Guardian Mut. L. Ins. Co., supra.*) We do mean to say, however, that when the insured undertakes to incorporate the notice and the proof in the same communication to the insurer, and the proof of the cause of death, with the attending facts, meets all the requirements of the policy, except that it is not as full and explicit as it might be, the silence of the insurer is a waiver of his right to object.

What we have already said is sufficient answer to a further contention by counsel that the required proofs were not furnished to the defendant within two months from the death of Pinazza, as required by paragraph 2 of the General Agreements, and that the action was therefore prematurely brought.

Contention is made that recovery cannot be had because it appears affirmatively that Pinazza voluntarily exposed himself to unnecessary danger, within the meaning of paragraph 10 of the General Agreements. When it became known to deceased and his companions that a fellow-workman was in danger, and they went to his rescue, they found him lying about five feet

from the entrance of the drift. They had hurried up a ladder to reach the place. Pinazza, apparently thinking that he could go in that distance with safety, did so, and, in attempting to drag the injured man out, was overcome, and while the rest of the party were engaged in rescuing the two, he was so far injured that he died. The presence of gas was apparent as soon as the party reached the place. The general rule on this subject is that the law has so high a regard for human life that it will not impute negligence to one who attempts to save it, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons. (1 Labatt on Master and Servant, sec. 360; Thompson on Negligence, 2d ed., 5435.) Thus stated, the rule is broad enough to cover, not only an attempt to save life under spontaneous impulse, aroused by sudden and unexpected perception of the peril, and without thought or calculation of the chances of injury or loss of life to him who makes the attempt, but also an attempt which is made after such calculation as the circumstances permit, the rescuer acting upon the conclusion that he can save the life without the loss of his own. In the latter case the exposure is voluntary in a sense, yet, if under the same circumstances a prudent man would obey the impulse to save a life, the exposure ought not to be held to be voluntary, within the meaning of the contract. At any rate, the danger is not, under the circumstances, unnecessary. This rule, we think, is fairly deducible from the adjudicated cases. (*Thomas v. Quartermaine*, 18 Q. B. D. 685; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903, 48 L. R. A. 359; *Cottrill v. Chicago etc. Ry. Co.*, 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914; *De Loy v. Travelers' Ins. Co.*, 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Williams v. United States Mut. Acc. Assn.*, 60 Hun, 580, 14 N. Y. Supp. 728; *Tucker v. Mutual Benefit Co.*, 50 Hun, 50, 4 N. Y. Supp. 505; *United States Mut. Acc. Assn. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 40 L. R. A. 453; *Smith v. Aetna Life Ins.*

Co., 115 Iowa, 217, 91 Am. St. Rep. 153, 88 N. W. 368, 56 L. R. A. 271; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; *Schneider v. Provident L. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157; *Providence L. & I. Co. v. Martin*, 32 Md. 310.)

The rule which applies to this provision of the policy is analogous to that which governs the defense of contributory negligence. The engineer who stands at his throttle in the presence of imminent danger of collision or the derailment of his train by an obstruction on the track, in an effort to save his passengers, and is killed or injured, cannot be said, as a matter of law, to be guilty of contributory negligence. He voluntarily exposes himself to the peril, but not unnecessarily so. The circumstances demand that he do his duty, and he does so in obedience to those higher impulses which must govern the conduct of the average prudent man. He may use his best judgment as to whether he can save his passengers by assuming the risk, and it is for the jury to say whether in doing so he is guilty of contributory negligence. So, also, in other practical affairs of life. Emergencies often arise calling for immediate action. In all such cases, though action may be accompanied by danger, yet while the exposure to it is voluntary, the danger cannot in any sense of the term be said to be unnecessary. On this subject the court in *Fidelity & Casualty Co. v. Sittig*, *supra*, said: "For one to leap into a turbulent stream, rush into a burning building, or do any other hazardous thing to save human life, would be a voluntary exposure to danger, but not to unnecessary danger. So, too, many emergencies in the lives of men occur where the most urgent necessity requires their presence at some particular place at some particular time, and where to miss a train would involve serious consequences. In such a case a voluntary exposure to danger might not be unnecessary. The presence of a physician or surgeon at some critical period in the illness or injury of a human being might be necessary to save life, and it might be necessary for him to expose himself to danger to reach his patient, or in some other

respect to perform his professional duty. The necessity implied in the provision of the policy does not mean only that which is unavoidable or inevitable, but also any object or purpose which men of moral responsibility and prudence would regard as of such serious importance in the performance of duty as to demand or justify the incurring of risk of danger to accomplish it." Under the circumstances, the question whether the exposure of himself, by Pinazza, was unnecessary, was for the jury.

Contention is made that the evidence does not show that Pinazza's death was caused by the inhalation of gas. There is no merit in this contention. The evidence establishes the presence of gas in the drift; that Labek was overcome by it; that Pinazza went in to rescue him, and was apparently overcome just as was Labek; that his companions suffered more or less from it during the process of rescue; and that they were finally compelled to make use of helmets to protect themselves, before they succeeded in accomplishing it. There was no medical testimony introduced as to the specific cause of death, but, taking the evidence as a whole, it is amply sufficient to justify a finding that the cause of it was the inhalation of gas, as alleged.

Fault is found with certain of the instructions. In the preparation of their brief counsel failed to comply with the rule as to the specifications of error in this regard (Rule X, subdivision "b" [37 Mont. xxxii, 103 Pac. x]); we have nevertheless given attention to the criticisms made, and conclude that they are also without substantial merit.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

ALYWIN, PLAINTIFF, v. MORLEY ET AL., DEFENDANTS. MORLEY ET AL., APPELLANTS, v. CONROY, RESPONDENT.

(No. 2,816.)

(Submitted April 7, 1910. Decided April 25, 1910.)

[108 Pac. 778.]

Accounting—Counterclaim Against Codefendant—Pleading—Judgments—Contracts—Construction—Appeal—Parties.

Contracts—Ambiguity—Construction.

1. Where a contract on its face is ambiguous and uncertain, it must be construed in the light of all the surrounding facts and circumstances bearing upon the transaction.

Equity—Findings—Review.

2. A finding of the district court, in an equity case, which is supported by substantial testimony, will not be disturbed on appeal.

Accounting—Who may not Claim.

3. One who has not made a demand for an accounting may not, and one who knows exactly the amount claimed to be due him has no occasion to, invoke the aid of a court of equity for an accounting.

Pleadings—Cross-bills.

4. Under the Code practice there is no such pleading in this state as a cross-bill.

Accounting—Counterclaims Against Codefendant—Pleading.

5. *Quære*: In view of the fact that section 6541, Revised Codes, defining a counterclaim, makes no mention of a claim by one defendant against another, may a defendant obtain affirmative relief against a codefendant, under the Code practice, in an action for an accounting, by filing a pleading in the nature of a counterclaim?

Same—Case Made as Between Defendants—Pleadings—Insufficiency.

6. Plaintiff brought an action for an accounting. The facts stated in his complaint were upon trial found to be untrue, and his action was dismissed. One of defendants filed an answer asking for an accounting against her codefendants. This pleading was insufficient in that she had never made any demand for an accounting. She obtained judgment as prayed. *Held*, that the court erred in granting the relief thus asked, in that, assuming that *where plaintiff has and states a cause of action* for an accounting, the court may, in order to avoid a multiplicity of suits, determine the whole controversy, settle the rights of the defendants *inter sese* and grant one defendant affirmative relief against a codefendant even though his answer may be insufficient to support a judgment, the allegations of plaintiff's complaint which he failed to substantiate had become so much surplusage, and, the defendant's pleading having proven insufficient, there therefore was not *any* pleading to sustain the decree.

Appeal—Necessary Parties.

7. Where, in a suit for an accounting, a defendant obtained a judgment against two codefendants, who appealed therefrom, the plaintiff, as to whom the complaint was dismissed, and the remaining defendant, were not necessary parties to the appeal.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by F. P. Alywin against E. A. Morley and others. From a judgment for defendant Estella Conroy against E. A. Morley and another, and from an order denying them a new trial, the latter appeal. Reversed and remanded.

In behalf of Appellants, there was a brief by *Messrs. Kremer, Sanders & Kremer*, and oral argument by *Mr. Bruce Kremer*.

The appellants contend that the separate answer of Estella Conroy did not contain a statement of facts sufficient to warrant the granting of the relief prayed for therein, or to warrant the court in making its finding and rendering its judgment and decree herein in favor of the defendant Conroy and against the defendants Morley and Bornholdt. It is in the nature of a cross-complaint against the defendants Morley and Bornholdt, and must state a cause of action, or the proceedings cannot be maintained by her. The essential averments to entitle her to an accounting are not contained therein. (Sec 1 Ency. of Pl. & Pr. 98; 1 Current Law, 14; 1 Cyc. 436, 437; *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775, 41 S. E. 410, 57 L. R. A. 417; *Eisner v. Eisner*, 38 N. Y. Supp. 671; *Clinton Co. v. Schuster*, 82 Ill. 137; *Kaston v. Paxton*, 46 Or. 308, 114 Am. St. Rep. 871, 80 Pac. 209; *Eccard v. Brush*, 48 Mich. 3, 11 N. W. 756; *Everett v. De Fontaine*, 78 App. Div. 219, 79 N. Y. Supp. 692; *Hulsey v. Walker County*, 147 Ala. 501, 40 South. 311.) It is further insufficient to warrant the affirmative relief, because it does not allege a demand and refusal to account. (*Wetzstein v. Boston & M. C. C. & S. M. Co.*, 28 Mont. 451, 72 Pac. 865; *Ayotte v. Nadeau*, 32 Mont. 515, 81 Pac. 145.) The mere recital of the fact that a party is entitled to something cannot be construed to be equivalent to an allegation of indebtedness; and an allegation of indebtedness is necessary. (*Volmer v. McCauley*, 7 Phila. 382; *Metz v. Farnham*, 8 Phila. 267.) All that the pleading alleges in this

behalf is that notwithstanding her repeated demands for an accounting, these appellants have not accounted, and will not. Instead of asserting that "notwithstanding her repeated demands," etc., defendant may as well have alleged that "whereas she had repeatedly demanded," etc., and such allegation would have come squarely within the condemnation of such pleading by Mr. Bliss in his work on Code Pleading, section 318. The same principle might be applied to the attempted allegation in paragraph 3, reciting that "by virtue of the profits," etc.

The authorities unanimously condemn such pleading. (See *Indianapolis etc. Co. v. Foreman*, 162 Ind. 85, 102 Am. St. Rep. 185, 69 N. E. 669; *Delaware County Nat. Bank v. King*, 109 App. Div. 553, 95 N. Y. Supp. 956; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Ilfeld v. Zeigler*, 40 Colo. 401, 91 Pac. 825; *Groton v. American Bridge etc. Co.*, 151 Fed. 871; *Leadville etc. Co. v. Leadville*, 22 Colo. 297, 45 Pac. 362; *Southern Ry. Co. v. Elliott*, 170 Ind. 273, 82 N. E. 1051.)

Messrs. Maury & Templeman, and *Mr. J. O. Davies*, submitted a brief in behalf of Respondent. *Mr. J. L. Templeman* argued the cause orally.

Is defendant Conroy's answer sufficient in law to support the judgment in her favor? We think so. The settled practice in this sort of a case is that the answer of the defendant need not meet the requirements of a complaint for an accounting to support an accounting and a judgment in the defendant's favor. (Street's Federal Equity Practice, sec. 1026.) We freely concede that the bill or complaint for an accounting should contain the particulars pointed out in counsel's brief, but seemingly, the logical point here would be, "Does the plaintiff's complaint state a cause of action for an accounting?" rather than, "Is defendant's answer sufficient to support a judgment?" Since the judicial reasoning is that upon the bill for an account by one partner against his copartner, after the termination of the partnership, if a balance is found against complainant in favor of defendants or any of them, a decree

may be entered in favor of such defendants upon the plaintiff's bill. (*Raymond v. Came*, 45 N. H. 201.)

The trial court in this case, having jurisdiction of both the subject matter and the parties interested, concluded to, and did, determine the whole controversy once and for all—if conformable to the views of this court. The court was justified in so doing, by section 6498, Revised Codes. (See, also, *Vierra v. Fontes*, 135 Cal. 126, 66 Pac. 241.)

We concede that, as a general rule, a cross-bill is necessary to entitle a defendant to affirmative relief, but a suit for an accounting is the exception to the rule. (1 Am. & Eng. Ency. of Law & Pr. 755; see, also, *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229; *Trapnall v. Byrd*, 22 Ark. 10; *Craig v. Chandler*, 6 Colo. 543; *McKaig v. McKaig*, 50 N. J. Eq. 325, 25 Atl. 181; *McKee v. Dail*, 1 Tenn. Ch. App. 689; *Little v. Merrill*, 62 Me. 328.)

MR. JUSTICE SMITH delivered the opinion of the court.

On the thirty-first day of July, 1907, the plaintiff brought this action in the district court of Silver Bow county against the above-named defendants, and in his complaint he alleges that in the month of May, 1904, he, together with J. R. Davenport, E. A. Morley, and Mrs. Minnie Bornholdt, entered into an agreement wherein they became mining copartners for the purpose of carrying on a leasing business on what was known as the tailings dump of the smelter plant of the Parrot Silver and Copper Company; that Morley had secured a lease or privilege to work the tailings and extract the valuable metals therefrom, and said lease or privilege became the property of the copartnership; that each of the parties owned a one-fourth interest in the copartnership; that Morley assumed and took active charge of the operations, and looked after the shipment and sale of the precipitates on behalf of the association; that, after conducting the business for some time, Davenport sold and conveyed his interest to the defendant Estella Conroy, and she became, by common consent of all the parties, a copartner

in the business; that the agreement of copartnership entered into between the parties is as follows:

“Butte, Montana, May 25th, 1904.

“Whereas, E. A. Morley has secured a lease from the Parrot Silver & Copper Company for the handling of the tailings at their smelting plant, and,

“Whereas, the said E. A. Morley proposes to enter into an agreement with J. R. Davenport and others for the erection of a precipitating plant at the above-mentioned tailings dump,

“It is hereby agreed between E. A. Morley and J. R. Davenport that the said J. R. Davenport is to furnish sufficient funds for the erection of a plant to be mutually agreed upon.

“It is also understood and agreed that the said J. R. Davenport is to be reimbursed for his outlay in the erection of the plant from the first clean-ups of precipitates. In consideration of this outlay the said J. R. Davenport is to receive one-fourth ($\frac{1}{4}$) interest in the net proceeds of the proposition, and is to have a voice in matters pertaining to the operation of the plant according to his holdings.

“The above mentioned E. A. Morley and others have made an outlay of about \$500 in the erection of a plant on the above-mentioned grounds, a portion of which will be used in the plant to be constructed, and it is understood and agreed that the said E. A. Morley and his associates are to be reimbursed from the first clean-ups the full amount of their outlay.

“It is also understood and agreed that F. P. Alywin and Mrs. Minnie Bornholdt are each a one-fourth ($\frac{1}{4}$) owner in the above-mentioned lease and are parties of the above contract and agreement.

“[Signed] E. A. MORLEY.

“J. R. DAVENPORT.

“MRS. MINNIE BORNHOLDT.

“FRANCIS P. ALYWIN.”

Plaintiff further alleges that before the commencement of the action the defendants Morley and Bornholdt excluded him from any participation in the business, and denied that he had any

rights therein; that on the twenty-fourth day of December, 1906, he demanded of all of the defendants a full, true and detailed account of the receipts and expenditures, and of all things pertaining to said leasing and precipitating business, and demanded a complete accounting and settlement of all of its affairs, and payment of any moneys due him therefrom, but that said demand has been refused. The complaint then alleges that the copartnership realized a large amount of money from the precipitating business in which it was engaged, and that Morley and Bornholdt converted the greater part thereof to their own use. An accounting is prayed for.

The separate answer of the defendant Estella Conroy reads as follows:

“Comes now the defendant Estella Conroy, above named, and for her separate answer to the complaint of plaintiff on file herein alleges:

“(1) That this defendant is now, and ever since the 15th day of September, 1905, has been, a copartner with the plaintiff Alywin, above named, and E. A. Morley and Minnie Bornholdt of the defendants, above named, in and to that certain leasing business more particularly specified and set out in the complaint of the plaintiff on file herein and owning in said business a one-fourth interest therein.

“(2) That, notwithstanding her repeated demands from the defendants Morley and Bornholdt for an accounting in said business, the said Morley and Bornholdt have not accounted to her and will not account to her.

“(3) That the copartnership in said business has not been settled, and that this defendant is entitled to the sum of one thousand (\$1,000) dollars from the defendants Morley and Bornholdt aforesaid by virtue of the profits accruing from said partnership business and to other sums.

“Wherefore, this defendant prays for an accounting on said partnership business, and for judgment against such of the parties hereto in such an amount as her right and interest shall appear, and for such other and further equitable relief as she may be entitled to in the premises.”

The defendants Morley and Bornholdt by their separate answer denied that Davenport was ever a partner in the business; denied that the privilege of working the tailings of the Parrot Company ever became an asset of any copartnership in which the plaintiff was a member; denied that either the plaintiff or Davenport ever owned a one-fourth interest in any property belonging to the association; admitted that Davenport sold his interest in the association to Estella Conroy; denied that the agreement between the parties, as set forth in the complaint, constituted a copartnership agreement or was ever intended as such. They alleged that on the fourteenth day of May, 1904, Morley and Bornholdt entered into a contract in writing with plaintiff as follows:

“AGREEMENT.

“Whereas, E. A. Morley has secured a lease from the Parrot Silver & Copper Company for the handling of the tailings at their smelter in Butte for profit, and,

“Whereas, F. P. Alywin has a process for leaching and precipitating which he claims can be used with success on the tailings above mentioned;

“Now, therefore, for and in consideration of the knowledge and use of said process, the said E. A. Morley hereby agrees to pay over to the said F. P. Alywin one-third of the net proceeds of the working of said tailings under the process put into use by the said F. P. Alywin.

“It is further understood and agreed that, should the process not prove profitable, the said F. P. Alywin is to stand one-third of the expense of putting in the plant and making the test.

“Signed and sealed the day and date above written.

“[Signed] E. A. MORLEY.

“F. P. ALYWIN.

“MRS. MINNIE BORNHOLDT.”

They then alleged that, pursuant to the provisions of the said contract, Alywin undertook to demonstrate and make a success of his alleged process for leaching; that Morley and Bornholdt

advanced the sum of \$700; that the process was a complete failure; that thereupon Alywin stated that he could procure a party to advance the money necessary for the erection and construction of a precipitating plant, and Morley and Bornholdt then agreed that, if he would procure such a party and devote his entire time and attention to the operation of the plant and make it a success, they would allow him to participate in the net profits of the plant substantially on the terms set out in the agreement last quoted; that Alywin agreed to this, and, pursuant thereto, sent the defendant Davenport to Morley's office for the purpose of entering into an arrangement; that "thereupon these answering defendants made to the said Davenport two propositions, namely, one proposition that he should put into the enterprise the sum of \$2,000, and by the payment of said sum should be entitled to a one-fourth interest in the entire enterprise, and a second proposition that he should pay into the concern \$2,000 for the erection of a plant, which said sum should be repaid to him, and thereafter he should receive one-fourth of the net profits of the precipitating plant, and should have no further interest in the enterprise except in the net profits of the operations thereof; that the said Davenport accepted the latter proposition, and thereupon the instrument set out in the complaint was drawn up by the defendant Morley"; that the parties to the first agreement always understood that Alywin's interest was contingent upon success and upon his continued operation of the plant, and that, in the event of his quitting the said plant at any time, his interest would cease; that on or about the tenth day of September, 1904, said Alywin quit and abandoned said enterprise, and then and there stated that he had no further interest in the said plant or in said enterprise. It is then alleged that on or about July, 1904, Alywin sold his interest in the enterprise to Davenport, and Morley afterward bought the interest from Davenport.

For replication the plaintiff denied each and every allegation of the amended answer. As a separate answer to the affirmative matter set forth in the answer of Estella Conroy, the defendants Morley and Bornholdt denied that Conroy had any interest

in the enterprise except a one-fourth interest in the net profits thereof. They denied that she was ever a copartner, denied that she had ever made a demand for an accounting, or that either of the defendants had ever failed or refused to account to her, but, on the contrary, they alleged that she had received from them all that she was entitled to under the agreement. They denied that she was entitled to the sum of \$1,000 or any other sum as set forth in her answer. They then alleged affirmatively "that, before the said Estella Conroy procured any assignment of any interest whatever in the net profits of the operation of said plant or any assignment whatever from said Davenport, she was fully informed by these answering defendants as to the right of said J. R. Davenport in the net profits of the operation, and fully understood and agreed to all the matters hereinabove alleged as to the rights of the said Davenport, and agreed that, in the further operation of the said plant, she was to participate in the net profits of the operation of such plant to the extent of one-fourth of said net profits, and had no interest whatever in the plant; that thereafter, to-wit, on the fifteenth day of June, 1906, an account was stated, settled, and agreed upon by and between Estella Conroy, acting by her duly authorized agent, J. H. McQueeney, and the defendant Morley, relative to all matters pertaining to the operation of said plant under said contract referred to, and thereupon the said defendant Estella Conroy, by her duly authorized agent, acknowledged full settlement and satisfaction of all claims and demands which she had or claimed to have against these answering defendants Morley and Bornholdt." This latter allegation was put in issue by a further answer on the part of Estella Conroy.

The cause was tried to the district court of Silver Bow county sitting without the aid of a jury. The following findings of fact were made:

"(1) That on the fourteenth day of May, 1904, the plaintiff, F. P. Alywin, and the defendants E. A. Morley and Mrs. Minnie Bornholdt, entered into an agreement to operate a precipitating copper plant at the tailings of the Parrot smelter and to divide

the net profits, if any, arising from such operation equally amongst them.

“(2) That immediately thereafter the three persons named began the erection of said precipitating plant, and completed it on or before May 25, 1904.

“(3) That on the twenty-fifth day of May, 1904, the plaintiff, F. P. Alywin, and the defendants E. A. Morley, Mrs. Minnie Bornholdt, and J. R. Davenport, entered into a contract, whereby it was agreed that the said Davenport should furnish sufficient money to build a new precipitating copper plant at the tailings of the Parrot smelter, and should be reimbursed from the first net proceeds of the precipitating business. That the said Alywin, Morley and Bornholdt had expended the sum of about \$500 in the erection of the old plant, and should also be reimbursed from the first net proceeds of the said precipitating business, and that each of the four persons named should have a one-fourth interest therein.

“(4) That the said Davenport furnished the money, to-wit, the sum of \$2,000, with which to build the new plant, and the same was built at and near the site of the old plant between the twenty-fifth day of May, 1904, and the fifteenth day of June, 1904, and was operated continuously from its completion to the twenty-ninth day of May, 1906.

“(5) That the plaintiff was placed in charge of the said plant as foreman, and continued so in charge until on or about the tenth day of September, 1904, when he was discharged by the defendants Morley and Bornholdt for want of attention to the duties of his position.

“(6) That on the first day of June, 1904, the plaintiff mortgaged to the defendant Davenport his interest in said business to secure loans made in the past and to be made in the future by the latter to the former.

“(7) That on or about the tenth day of September, 1904, the plaintiff abandoned said business, left the state of Montana, and ever since has resided outside the state of Montana, and during the continuance of said business thereafter took no interest in or paid any attention to it.

“(8) That from the twenty-fifth day of May, 1904, to on or about the tenth day of September, 1904, the said business did not pay, and no profits were derived from the operation of said plant.

“(9) That on the twenty-third day of November, 1904, J. R. Davenport sold and assigned to E. A. Morley all his title and interest in and to Alywin's interest in said business.

“(10) That on the fifteenth day of September, 1905, J. R. Davenport sold to the defendant Estella Conroy, with the consent of the said Morley and Bornholdt, his interest in said business and plant, and thereafter the said Conroy held said interest upon the same terms and [as?] the said Davenport had held it.

“(11) That on or about the twenty-ninth day of May, 1906, the said plant was sold for the sum of \$4,000, and thereafter, so far as the parties hereto are concerned, the business of producing copper from precipitation ceased.

“(12) That the gross receipts of said business from the twenty-fifth day of May, 1904, to the twenty-ninth day of May, 1906, amounted to the sum of \$48,664.40, and the total expenses to the sum of \$30,556.90.

“(13) That the net profits of said business, amounting to the sum of \$18,107.50, were from time to time divided equally among E. A. Morley, Mrs. Minnie Bornholdt, J. R. Davenport, or his successor in interest, Estella Conroy, and one John W. Thomas. That the sum derived from the sale of said plant was divided between E. A. Morley and Mrs. Minnie Bornholdt, and that Estella Conroy received no part thereof.”

The court also drew the following conclusions of law: “(1) That the plaintiff, F. P. Alywin, and the defendants E. A. Morley and Mrs. Minnie Bornholdt, were copartners from the fourteenth to the twenty-fifth day of May, 1904.

“(2) That the plaintiff, F. P. Alywin, and the defendants E. A. Morley, Mrs. Minnie Bornholdt, and J. R. Davenport, became copartners on the twenty-fifth day of May, 1904, and continued to be such until on or about the tenth day of September, 1904.

“(3) That on or about the tenth day of September, 1904, the partnership as to F. P. Alywin was dissolved.

“(4) That, as to E. A. Morley, Mrs. Minnie Bornholdt, and J. R. Davenport, the partnership continued until the fifteenth day of September, 1905, when Estella Conroy took the place of J. R. Davenport therein.

“(5) That E. A. Morley, Mrs. Minnie Bornholdt, and Estella Conroy continued to be copartners until the twenty-ninth day of May, 1906, when the partnership was dissolved.

“(6) That the plaintiff is not entitled to an accounting from the defendants or either of them.

“(7) That the defendant Estella Conroy is entitled to an accounting from the defendants E. A. Morley and Mrs. Minnie Bornholdt to receive from them one-fourth of the selling price of said plant, to-wit, the sum of \$1,000, and to have judgment against them for said sum.

“(8) That the appearing defendants are entitled to a judgment of dismissal against the plaintiff and for their costs expended.”

And afterward the court made and filed the following decree: “It is ordered and adjudged that as to the plaintiff, F. P. Alywin, the complaint be dismissed upon the merits of the suit, and that the defendant Estella Conroy do have and recover from the defendants E. A. Morley and Minnie Bornholdt the sum of \$1,000.” From this decree and an order denying them a new trial, the defendants Morley and Bornholdt have appealed to this court.

1. It is contended on the part of the appellants that the language employed by the parties in the agreement, which is denominated by the plaintiff and by the defendant Conroy a partnership agreement, is plain and free from ambiguity, and that its clear meaning is that Davenport was to have simply a one-fourth interest in the net profits of the enterprise, and therefore defendant Conroy had no interest whatsoever in the sum of \$4,000, realized by Morley from a sale of the plant to the Parrot Company. So far as the record discloses, there is no controversy between the parties to this appeal over any of the

profits of the business as such, but the sole question is whether Conroy, through Davenport, acquired a one-fourth interest in the proceeds of the sale of the plant. The district court held that she did, and this is the main point in controversy between the parties. It is argued on the part of the appellants that, when the parties agreed that Davenport was to have a voice in matters pertaining to the operation of the plant according to his holdings, he tacitly acknowledged that without such provision he would not have any voice in the operation of the plant, on account of the fact that his interest pertained solely to the profits; and it is further argued that if, as is now claimed by the defendant Conroy, Davenport secured at that time a one-fourth interest in the entire enterprise, it would have been wholly unnecessary to provide that he should have a voice in the matter of the operation, because of the fact that his partnership interest would give him such voice without special agreement. On the other hand, it is maintained by the respondent Conroy that the phrase "net proceeds of the proposition" includes not only net profits, but also includes a one-fourth interest in whatever sums were derived from the venture, either in the way of profits or upon a final sale of the property. We have given this clause of the contract a great deal of thought and consideration. The language employed is somewhat peculiar. On the one hand, it may be argued that, if the intention was to give Davenport simply a one-fourth interest in the profits, it would have been very easy to have said so; on the other hand, if he was to become equally interested with his associates in the entire venture, including the plant, there would have been no difficulty whatever in simply declaring that fact. We cannot avoid the conclusion that the contract on its face is ambiguous and uncertain; that its meaning is not clear. This being the case, it was the duty of the district court to construe it in the light of all the surrounding facts and circumstances bearing upon the transaction. In other words, it became the duty of the court to place itself, as near as might be, in the situation occupied by the parties at the time they entered into the agreement. There is positive testimony on the part of

Morley and Bornholdt that the agreement with Davenport was as set forth in their separate answer; that is to say, that they gave him his option to allow his money to be permanently invested, and receive as consideration therefor a one-fourth interest in the whole enterprise, or to withdraw the amount advanced by him from the first proceeds of the sale of precipitates, and take simply a one-fourth interest in the net profits of the concern. This testimony, if uncontradicted, would have fully warranted the court in believing that the words "net proceeds of the proposition," as found in the written agreement, were intended to mean net profits. The testimony is clear, explicit and reasonable. However, J. R. Davenport, the other party to the agreement, declared that there was no such arrangement between the parties, that no such option was ever given, and that the understanding was that he was acquiring a one-fourth interest in the entire venture. The district court evidently credited the story told by Davenport, and discredited that of the appealing defendants. This is manifested by the findings of fact made by the court. Under these circumstances, there being substantial testimony to warrant the findings, this court cannot interfere with the result. (*Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860; *White v. Barling*, ante, p. 138, 108 Pac. 654; *Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821.)

2. The record appears to disclose the fact that Mrs. Conroy was not present at the trial, either personally or by counsel. No evidence was offered in her behalf. It is significant that in her answer she claims the sum of \$1,000 and other sums, not as a part of the proceeds of the sale of the plant, but "by virtue of the profits accruing from the partnership business." The plaintiff does not appear to have been personally at the trial. All of the testimony relating to the conditions under which the Morley-Bornholdt-Davenport contract was executed was introduced by counsel for the plaintiff, and by the defendants Morley and Bornholdt without objection. No objection could have been successfully interposed thereto, for the reason that the evidence was relevant to the controversy between those parties. So far as the record discloses, no demand was ever made for an account-

ing by the respondent, and no claim can now be made, in view of the findings of the trial court, that she is entitled to more than a share of the \$4,000 received from the sale of the plant. The testimony shows conclusively, and the court by implication found, that all of the profits derived from the enterprise had been fully accounted for by Morley, and divided between the parties prior to the commencement of Alywin's action. Upon this state of facts, had the defendant Conroy commenced the action, she would undoubtedly have failed of relief in a court of equity for two reasons: (1) That she had never given Morley and Bornholdt an opportunity to account (see *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145); and (2) that she knew exactly the amount claimed to be due her, to-wit, a certain percentage of \$4,000, and therefore she had no occasion to invoke the aid of a court of equity. (See *Wetzstein v. Boston & Mont. C. C. & S. Min. Co.*, 28 Mont. 451, 72 Pac. 865.) The phrase, "and to other moneys," found in her answer, is meaningless in the light of the findings. She made no effort to show that any other moneys were due her, and the findings disclose the fact that the only claim she could have was for a share of this \$4,000. The record shows affirmatively that no accounting was necessary between these defendants. As the defendant Conroy failed to substantiate her allegation that she had demanded an accounting with her codefendants, and she alleged no necessity for an accounting, her answer, in the light of the findings, discloses simply a claim against them at law for \$1,000. (See 15 Ency. of Pl. & Pr. 1031.)

Counsel for respondent freely concede in their brief that the bill or complaint for an accounting should contain the particular allegations contended for by the appellants; but they maintain that the real question is: "Does the plaintiff's complaint state a good cause of action for an accounting?" and not: "Is the defendant's answer sufficient to support a judgment?" They contend that, as the complaint is undoubtedly sufficient, it was the duty of a court of equity, after having once obtained jurisdiction, to do complete justice by determining the whole controversy so as to prevent future litigation and multiplicity of suits. They cite *Raymond v. Came*, 45 N. H. 201, *Vierra*

v. *Fontes*, 135 Cal. 126, 66 Pac. 241, section 20, Street's Federal Equity Practice, and section 6498, Revised Codes, in support of their position. They also say in their brief: "We concede that as a general rule a cross-bill is necessary to entitle a defendant to affirmative relief, but opposing counsel fail to note that a suit for an accounting is an exception to the rule." And they cite 1 American and English Encyclopedia of Law and Practice, page 755, to this effect: "As a general rule, to entitle a defendant to affirmative relief, it is necessary that he file a cross-bill. But in suits for an accounting, in order to entitle the defendant to credits for items in his favor in the accounting and a decree in his favor in case the balance on the accounting is in his favor, a cross-bill is not necessary. * * * It seems that an accounting may also be directed as between codefendants and a decree entered settling their rights *inter se* without the necessity of a cross-bill. In such cases accountings are only directed where a case is made out between the codefendants and is supported by the evidence." They also cite *Downes v. Worch*, 13 Am. & Eng. Ann. Cas. 647, and note.

In this state there is no such pleading as a cross-bill. The only fact pleading allowed on the part of the defendant is an answer (Revised Codes, sec. 6530), which must contain: (1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, or a specific admission or denial of some of the allegations of the complaint, and also a general denial of all the allegations of the complaint not specifically admitted or denied in the answer; (2) a statement of any new matter constituting a defense or counterclaim. (Revised Codes, sec. 6540.) Section 6541, Revised Codes, defines a counterclaim. No mention is made of a claim against a codefendant. Without deciding whether under our Code practice a defendant may obtain affirmative relief in an action for an accounting by filing a pleading in the nature of a counterclaim against a codefendant, we will assume that neither a cross-bill nor an answer containing a counterclaim is a necessary pleading on the part of a defendant against a codefendant in a

case where the plaintiff has and states a cause of action. Relying upon this assumption, it may be said that the defendant Conroy's case was properly before the court for complete adjudication and relief against all other parties to the action at the beginning of the trial. It will, however, be conceded that the judgment in her favor must rest upon some proper pleading, either her own or that of the plaintiff. A judgment without a pleading to support it cannot stand; and this is the reason why the question whether a complaint states facts sufficient to constitute a cause of action is never waived and can be raised in this court for the first time.

The complaint of Alywin is, on its face, sufficient; but the facts therein stated are untrue in point of fact. The court so found. Therefore, if Alywin had, in his complaint, stated the facts as they actually existed, his complaint would not have set forth a cause of action. It has been judicially determined that he was not entitled to an accounting, and therefore the aid of a court of equity was improperly invoked by him. Those allegations of his complaint which he failed to substantiate became so much surplusage; and, the answer of the respondent being insufficient to state an affirmative cause of action for an accounting against the appellants, the decree has no pleading to sustain it. The respondent relied upon the ability of the plaintiff to make out a cause of action, at her peril. She should either have filed a proper pleading in her own behalf, if that can be done in an action like this—one upon which she could rely in case the plaintiff failed to make out a case—or she should have taken part in the trial and assisted Alywin in proving the allegations of his complaint. She did neither. The result is that, so far as the record discloses, she has a judgment against Morley and Bornholdt, without a pleading to support it, founded upon an alleged cause of action at law, in the final determination of the merits of which the appellants have a right to a trial by jury. This right could not be taken from them by an assertion on the part of the plaintiff, a third party, that he had a cause of action which he in fact did not have. If Alywin was not entitled to an accounting on the facts, and Mrs. Conroy was not entitled

to any on either her pleadings or the facts, then the cause should have been dismissed as to both.

In the case of *Schulz v. Schulz*, 138 Ill. 665, 28 N. E. 808, a father brought an action against his son to declare and enforce a resulting trust, for an account, and for a decree against defendant for any balance of money found due upon the accounting. At the hearing the complainant abandoned all claims for moneys due on an accounting, and asked for a decree respecting the real estate only. After a decree in favor of the complainant, the defendant in the supreme court contended that the cause should have been sent to the master to take and report an account. It was held that, as the defendant had filed no cross-bill, he was not entitled to any affirmative relief.

In the case of *Brewer v. Norcross*, 17 N. J. Eq. 219, which was an action for an accounting between partners, the defendant asked to have the affairs of another and different partnership between the same parties examined and settled. The court said: "If the balance upon the settlement of the account, in respect to which the bill is filed, should prove to be in favor of the complainant, but, upon the settlement of both accounts, the balance should be in favor of the defendant, what remedy could he have, or what decree could be pronounced upon the pleadings as they stand? If, in this aspect of the case, the defendant has any equity, he can have relief only by way of cross-bill."

In the case of *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229, it was held, in effect, that the general rule that affirmative relief will not be granted a defendant unless he files a cross-bill, applies to a bill for dissolution of a partnership and an accounting, where one of the partners desires affirmative relief upon grounds other than that of an adjustment of the accounts of the partners.

The supreme court of Arkansas, in *Trapnall v. Byrd's Admr.*, 22 Ark. 10, said: "The law is well settled that a court of chancery will make a decree between codefendants according to the equity of the case as founded upon the pleadings and proof between the complainants and defendants, but will not make a decree between them as to a matter outside of the pleadings

and proof between the complainants and defendants, unless by cross-bill."

We understand the rule to be in jurisdictions where the cross-bill is an appropriate pleading that one may be filed whenever the defendants, or either of them, have equities arising out of the subject matter of the original suit, which entitle them to affirmative relief which they cannot obtain in that suit (*Whittemore v. Patten* (C. C.), 84 Fed. 51); also, that in suits for an accounting a cross-bill is unnecessary in order to enable the defendant to recover the amount found due him upon the accounting, if the subject matter upon which he bases his claim for affirmative relief is the same as that set forth in the complaint or bill; but that whenever a defendant seeks affirmative relief, not based upon a case embodied within the issues tendered by the plaintiff, either by his pleadings or evidence, he must show his right thereto by appropriate pleadings in his own behalf. In this case the plaintiff failed to make out any cause of action. Therefore his entire case failed. His pleadings could no longer be considered. He was out of court. There was nothing in the case presented by him upon which to predicate a cause of action in favor of the respondent. Therefore her cause of action was necessarily beyond the scope of his case. It related to an independent matter, and must have had a pleading to support it in order to warrant the court in entering judgment in her favor. He demanded an accounting to which he was not entitled. She made no demand. The defendants were within their rights in refusing his demand. It seems, therefore, to follow that she may not predicate a right of recovery in this action upon the unwarranted demand made by him. A cross-demand cannot be germane to an alleged cause of action which has no existence in fact.

Whatever has been said in this opinion to the effect that the respondent's sole claim against the appellants was for a share of the moneys derived from the sale of the plant is not to be construed as a determination that such could have been her only claim. It is suggested in the brief of her counsel that she may have been entitled to a larger sum. But she is not an appel-

lant, and no exceptions on her part are found in the record. The district court seems to have found that the profits were properly divided. As she does not complain of these findings, we must assume that she is satisfied therewith. Hence the statement heretofore made that the amount allowed her is the full extent of her claim.

3. It is contended that the respondent's answer is insufficient for the reason that there is no proper allegation of the probative facts attempted to be set forth. There is apparently some warrant for the suggestion, but, in view of what has already been said, it becomes unnecessary to decide the question.

4. It is also suggested by counsel for the respondent that the association formed under the contract of May 25, 1904, was rather a "joint adventure" than a "copartnership." We do not decide the exact nature of the relation because it seems unnecessary to do so.

5. We are of opinion that neither Alywin nor Davenport was a necessary party to the appeal.

The judgment and order appealed from are reversed, and the cause is remanded to the district court of Silver Bow county.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

McGOWAN COMMERCIAL CO., RESPONDENT, v. MIDLAND
COAL AND LUMBER CO., APPELLANT.

(No. 2,814.)

(Submitted April 6, 1910. Decided April 25, 1910.)

[108 Pac. 655.]

*Statute of Frauds—Promise to Answer for Another's Debt—
Original or Collateral Promise—How Determined—Corpora-
tions—Officers—Authority—Jury Question.*

Statute of Frauds—Corporations—Officers—Authority—Jury Question.

1. Whether the president of a corporation, who, in requesting a merchant to furnish supplies to one who had contracted to cut timber for the company, had stated that he would see that the goods would be paid for, intended to bind himself or his principal, was a question for the jury's determination from all that was said and done and from all other surrounding facts and circumstances.

Same—Original or Collateral Promise—How Determined.

2. Where the question whether a promise was original or collateral depends solely upon the words used, the nature of the promise is a question of law for the court; where, however, the language of the promisor was used with reference to facts and circumstances tending to throw light upon the intention of the parties at the time, the question whether the promise was original or collateral to the promise of a third person becomes one of fact for a jury's determination.

Same.

3. In determining whether a promise was original or collateral to that of a third person, it is proper to inquire, among other things, whether the promisor had any immediate pecuniary interest in the transaction between the promisee and the person for whose benefit the promise was made.

Same.

4. While evidence that goods sold were charged to the person to whom they were delivered tends strongly to show that the seller gave credit and looked to him for payment, thus making the promise of another to answer for the debt a collateral one, it is not conclusive but open to explanation.

Same.

5. To make an oral promise to be answerable for the price of goods, delivered to another, original so as to take it out of the statute of frauds, credit must have been given exclusively to the promisor; but it is not necessary that the party for whose benefit it was made should be released from liability. It is only where one agrees to pay the pre-existing debt of another that the latter principle is applicable.

Same.

6. The fact that plaintiff in a letter to defendant had styled the latter a "guarantor" of an account for goods sold and delivered to a third person, which it was sought to collect upon the theory that defendant company, through its president, had promised to pay it, was not a determining factor in solving the question whether the alleged promise was original or collateral.

Nonsuit—Evidence of Plaintiff—How to be Viewed.

7. Upon a motion for a nonsuit the evidence will be accepted as true, for appeal purposes, and viewed in the light most favorable to plaintiff.

Appeal from District Court, Sanders County; Henry L. Myers, Judge.

ACTION by the McGowan Commercial Company against the Midland Coal and Lumber Company. From an order granting a new trial after judgment of nonsuit, defendant appeals. Affirmed.

Mr. E. M. Hall submitted a brief in behalf of Appellant, and argued the cause orally.

Appellant contends that it is necessary for respondent to affirmatively show that E. B. Clark, the president and manager of the appellant corporation, had authority from said corporation to guarantee accounts of third parties, and that in the absence of such proof it has wholly failed to make a sufficient case to go to the jury. (10 Cyc. 929; Cook on Corporations, 6th ed., sec. 774; *Helena National Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.)

Our second contention is that the evidence shows beyond question that the promise, if any, made by E. B. Clark, the president and general manager of the appellant company, was a special promise to answer for the debt, default or miscarriage of another, and, not being in writing, was invalid under section 5017 of the Revised Codes. The words used by him, namely: "You let Gibson have what he requires—what he needs—and I will see it is paid," constitute a collateral promise. (*Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. Dec. 148; *Mallory v. Gillett*, 21 N. Y. 412; *Wagner v. Hallack*, 3 Colo. 176.) See, also, the following cases in which the promise was made in substantially the same language as in the case at bar, and under facts very similar. In all these cases the promise was held to be collateral and invalid under the statute of frauds: *Wray v. Cox*, 86 Miss. 638, 38 South. 344; *Jenkins v. Lundgren*, 85 Ill. App. 494; *Halstead v. Pelletreau*, 101 App. Div. 125, 91

N. Y. Supp. 927; *Garrett-Williams Co. v. Hamil*, 131 N. C. 57, 42 S. E. 448; *Robertson v. Hunter*, 29 S. C. 9, 6 S. E. 850; *Walker v. McDonald*, 5 Minn. 368, 455; *Blake v. Parlin*, 22 Me. 395; *West v. Grainger*, 46 Fla. 257, 35 South. 91; *Indiana Trust Co. v. Finitzer*, 160 Ind. 647, 67 N. E. 520; *Skinner v. Conant*, 2 Vt. 453, 21 Am. Dec. 554; *Butters Salt etc. Co. v. Vogel*, 130 Mich. 33, 89 N. W. 560; *Birchell v. Neaster*, 36 Ohio St. 331; *Lewis v. Lewis Mfg. Co.*, 156 Pa. 217, 27 Atl. 20; *Newman v. Newman*, 7 Kan. App. 77, 52 Pac. 908. Furthermore, in order to take the promise out of the statute of frauds, the evidence must show that the credit was extended exclusively to the promisor, and that the third party was absolutely discharged from liability. (20 Cyc. 180, 182; *Jenkins v. Lundgren*, 85 Ill. App. 494; *Wray v. Cox*, 86 Miss. 638, 38 South. 344; *Robertson v. Hunter*, 29 S. C. 9, 6 S. E. 850; *Bloom v. McGrath*, 53 Miss. 249; *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856; *Welsh v. Marvin*, 36 Mich. 59; *Miller v. Lynch*, 17 Or. 61, 19 Pac. 845.)

If any credit be given to him for whose benefit the promise is made, the promisor is not liable unless his promise is in writing, and this is so although the collateral undertaking may have been the principal inducement to the delivery of the goods, which would not have been delivered at all but for such promise. (*Walker v. Richards*, 39 N. H. 259; *Bloom v. McGrath*, 53 Miss. 249; *Norris v. Graham*, 33 Md. 56; *Bugbee v. Kendricken*, 130 Mass. 437; *Doyle v. White*, 26 Me. 341, 45 Am. Dec. 110; *Robertson v. Hunter*, 29 S. C. 9, 6 S. E. 850; *Halstead v. Pelletreau*, 101 App. Div. 125, 91 N. Y. Supp. 927; *Mallory v. Gillett*, 21 N. Y. 412; *Mechanics'-Traders' Bank v. Stettheimer*, 116 App. Div. 198, 101 N. Y. Supp. 513; *Jenkins v. Lundgren*, 85 Ill. App. 494.) "Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was, at most, a collateral undertaking." (20 Cyc. 183; *Langdon v. Richardson*, 58 Iowa, 610, 12 N. W.

622; *McRoberts v. Mathews*, 45 N. Y. Supp. 431; *Hardman v. Bradley*, 85 Ill. 162; *Harris v. Frank*, 81 Cal. 280, 22 Pac. 857; *Kurtz v. Adams*, 12 Ark. 174; *Lomax v. McKinney*, 61 Ind. 374; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Webb v. Hawkins Lumber Co.*, 101 Ala. 630, 14 South. 407.)

The fact that the evidence shows that D. J. Gibson had a contract to get out saw-logs for appellant does not show a sufficient interest and benefit running to appellant to take Clark's promise out of the statute of frauds, especially where the evidence further shows that Gibson was already getting goods from another firm. (See *Clapp v. Webb*, 52 Wis. 638, 9 N. W. 796; *Butters Salt & Lumber Co. v. Vogel*, 130 Mich. 33, 89 N. W. 560; *Langdon v. Richardson*, 58 Iowa, 610, 12 N. W. 622; *Haverly v. Mercur*, 78 Pa. 257; *Clay v. Walton*, 9 Cal. 329; *Diamond Coal Co. v. Cook*, 129 Cal. xviii, 61 Pac. 578; *Tevis v. Savage*, 130 Cal. 411, 62 Pac. 611; *Perry v. Rodgers*, 62 Neb. 898, 87 N. W. 1063; *Andresen v. Upham Mfg. Co.*, 120 Wis. 561, 98 N. W. 518; *Brown v. Weber*, 38 N. Y. 187; *Miller v. Lynch*, 17 Or. 61, 19 Pac. 845.)

The promise of Clark being undisputed, it was, in effect, the same as a written instrument, and its legal effect was for the court, under the principle laid down in *Wortman v. Montana C. Ry. Co.*, 22 Mont. 266, 56 Pac. 316. (See, also, *Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Wagner v. Hallack*, 3 Colo. 177; *Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893; *Wray v. Cox*, 86 Miss. 638, 38 South. 344; *Garrett-Williams Co. v. Hammell*, 131 N. C. 57, 42 S. E. 448; *Fuller & Rice Lumber etc. Co. v. Houseman*, 114 Mich. 275, 72 N. W. 187; *Ferris v. Walsh*, 5 Har. & J. (Md.) 306; *Hall v. Wooden*, 35 Mich. 67; *Miller v. Lynch*, 17 Or. 61, 19 Pac. 845; *Bambrick v. Bambrick*, 157 Mo. 423, 58 S. W. 8; *Haverly v. Mercur*, 78 Pa. 257; *Halstead v. Pelletreau*, 101 App. Div. 125, 91 N. Y. Supp. 927.)

In behalf of Respondent, there was a brief by *Messrs. Marshall & Stiff*, *Mr. Geo. R. Ogden* and *Mr. Frank A. Roberts*; oral agreement by *Mr. Roberts*.

It was for the jury to determine whether or not the facts and circumstances were sufficient to show authority in the president and general manager of the defendant corporation in the first instance, or constituted a ratification of his action afterward. The presumption is in favor of the authority of an officer or agent to act for the corporation in matters within the scope of his office or agency. The necessities of daily business transactions demand this. (Angell & Ames on Corporations, 268-304; Story on Agency, secs. 52-56; *Carrigan v. Port C. I. Co.*, 6 Wash. 590, 34 Pac. 148; Thompson on Corporations, sec. 5029.)

The facts of this case bring it squarely within the provisions of section 5660, Revised Codes. The creditor, the McGowan Commercial Company, having parted with its property of value, in consideration of the promise made by the Midland Coal and Lumber Company, through Mr. Clark, its president and general manager, such a promise is deemed an original obligation of the promisor, and need not be in writing. (See *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863.)

Under the evidence, the issue presented was a question of fact for the jury, even under the provisions of the original English statute of frauds; it was for the jury to say, if, under all of the circumstances attending the transaction at the time when the promise was made, as well as from the language employed by the promisor, the promisee gave credit solely to the promisor. (*Johnson v. Bank*, 60 W. Va. 320, 55 S. E. 394, 9 Am. & Eng. Ann. Cas. 893; *Larsen v. Jensen*, 53 Mich. 427, 19 N. W. 130; *Greenough v. Eichholtz* (Pa.), 15 Atl. 712; *Chesebrough v. Tirrill*, 61 N. J. L. 628, 41 Atl. 215; *Boykin v. Dohlonde*, 37 Ala. 577; *Reynolds v. Simpson*, 74 Ga. 454; *Ruggles v. Gatton*, 50 Ill. 412; *Doherty v. Bell*, 55 Ind. 205; *Pelham v. Edwards*, 45 Kan. 547, 26 Pac. 41; *Homans v. Lambard*, 21 Me. 308; *Elder v. Warfield*, 7 Har. & J. 391; *Stone v. Walker*, 13 Gray (Mass.), 613; *Hall v. Woodin*, 35 Mich. 67; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *Lombard v. Martin*, 39 Miss. 147; *Glenn v. Lehn*, 54 Mo. 45; *Lindsey v. Heaton*, 27 Neb. 662, 43 N. W. 420; *Nesbitt v. Pioche Consol. Min. etc. Co.*, 22 Nev. 260, 38 Pac. 670; *Walker v. Richards*, 41 N. H. 388; *Het-*

field v. Dow, 27 N. J. L. 440; *McCaffil v. Radcliff*, 3 Robt. (N. Y.) 445; *Sheppard v. Newton*, 139 N. C. 533, 52 S. E. 143; *Booth v. Heist*, 94 Pa. 177; *Hazen v. Bearden*, 4 Sneed (Tenn.), 48; *Sinclair v. Richardson*, 12 Vt. 33; *West v. O'Hara*, 55 Wis. 645, 13 N. W. 894; *Doyle v. White*, 26 Me. 341, 45 Am. Dec. 110.)

The words used in the making of the promise do not stand alone, but all of the attending circumstances must be considered by the jury along with the language employed. (*Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; *Boston v. Farr*, 148 Pa. 220, 23 Atl. 901; *Brown v. Harrell*, 40 Ark. 429; *Maddox v. Pierce*, 74 Ga. 838; *Doyle v. White*, 26 Me. 341, 45 Am. Dec. 110; *Cheever v. Schall*, 87 Hun, 32, 33 N. Y. Supp. 751; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *Foster v. Felcher*, 119 Mich. 353, 78 N. W. 120; *King v. Franklin Lumber Co.*, 80 Minn. 274, 83 N. W. 170; *Ford v. McLane*, 131 Mich. 371, 91 N. W. 617; *Nesbitt v. P. C. Mining & R. Works*, 22 Nev. 260, 38 Pac. 670; *Hazeltine v. Wilson*, 55 N. J. L. 250, 26 Atl. 79; *Herendeen Mfg. Co. v. Moore*, 66 N. J. L. 74, 48 Atl. 525; *Hall v. Alford*, 105 Ky. 664, 49 S. W. 444; *Nixon v. Jacobs*, 22 Tex. Civ. App. 97, 53 S. W. 595.)

The fact the goods were charged on the books of the seller to the person to whom they were delivered is not conclusive that they were sold on his credit, but is a circumstance which can be explained, as was done in this case, by showing it was thus charged to prevent confusion of accounts. (*Newton Grain Co. v. Pierce*, 106 Mo. App. 200, 80 S. W. 268; *Foster v. Persch*, 68 N. Y. 400; *Hazen v. Bearden*, 4 Sneed (Tenn.), 48; *Walker v. Richards*, 41 N. H. 388; *Swift v. Pierce*, 13 Allen, 136; *Barrett v. McHugh*, 128 Mass. 165; *Champion v. Doty*, 31 Wis. 190; *Ruggles v. Gatton*, 50 Ill. 412; *Kesler v. Cheadle*, 12 Okl. 489, 72 Pac. 367; *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by the McGowan Commercial Company, a corporation, against the Midland Coal and Lumber

Company, a corporation, to recover the balance due on an account for goods, wares, and merchandise alleged to have been sold by the plaintiff to the defendant, and, at the special instance and request of defendant, delivered to D. J. Gibson. The answer is in effect a general denial of the allegations of the complaint. At the close of plaintiff's case the defendant moved for a nonsuit, and the motion was granted. Thereafter plaintiff moved for a new trial, and this motion was likewise granted. From the order granting a new trial, the defendant appeals.

There is not any dispute or inconsistency in the facts as they appear from the record. Those facts are: In January, 1908, the defendant company was engaged in business at Plains, Montana. It had purchased the logs from certain lands near there, and was anxious to have them removed, and to that end contracted with Gibson to do the work. In order to carry out his contract, Gibson required groceries and other provisions to supply his men engaged in the work, and, being without sufficient ready means, it became necessary for him to obtain credit. He applied for credit to the plaintiff company, which was engaged in the general mercantile business at Plains, and the officers of that company, after investigation, determined that Gibson was not financially responsible; that he would not be able to make any profit from his contract, and they therefore declined to extend credit to him. E. B. Clark, the president and general manager of the defendant company, was informed of this conclusion, and the following took place: An officer of the plaintiff company said to Clark: "Mr. Gibson has applied to us for credit to carry on his logging operations, and we have decided we cannot give him any credit, as we do not think him good," to which Mr. Clark said: "You don't; am I good?" "I [McGowan] said, 'You certainly are,' and he said: 'All right; you let Gibson have what he requires—what he needs—and I will see that it is paid, and you keep our office notified from time to time what the amount is.' " An officer of the plaintiff company then sought out Gibson, and induced him to trade with the plaintiff, and during January, February, March,

and April, 1908, Gibson secured goods from the plaintiff to the amount of \$769.05. These goods were charged on the books of the plaintiff to Gibson, and upon the first of every month an itemized bill of the goods delivered to Gibson during the preceding month was sent to him, and the defendant company was notified of the amount of goods thus delivered to Gibson. Upon April 13, the bookkeeper of the defendant company gave to the plaintiff this notice: "You will please not give any more goods to Mr. Gibson under the guarantee of Mr. E. B. Clark." After that date there were no more goods furnished Gibson by the plaintiff on that account. About May 19, E. B. Clark came to the plaintiff's store and paid \$300 on Gibson's account, and stated that, as soon as the logs which Gibson had delivered were scaled, "I will see that you get the balance of the money." In August following the plaintiff wrote a letter to the defendant company, at its office in Miles City, in which attention is called to the balance due on the account for goods delivered to Gibson, which letter concludes as follows:

"Kindly let us hear from you at your earliest convenience as we presume Mr. Clark had neglected to inform Mrs. Clark, who handles your business here, that he had guaranteed this account to both the writer and our Mr. McGowan."

"Yours very truly,

"MCGOWAN COMMERCIAL COMPANY,

"Per C. H. RITTENOUR, Secy."

The testimony further tends to show that the plaintiff did not rely upon, or look to, Gibson for payment for the goods thus delivered, but extended credit solely upon the assurance given by the defendant, through Clark, and looked to the defendant alone for payment. It further appears that after Gibson had completed his logging contract, the plaintiff company did extend credit to him on his own responsibility, to the extent of about \$60. The defendant company having refused to pay the balance of the first account, this action was brought. The other facts will appear later.

Counsel for appellant contends that the court erred in granting a new trial (1) because the evidence is insufficient to show

any authority in Clark to make a contract, on behalf of the defendant company, to answer for the debt of Gibson; (2) that the evidence shows that, if any promise was made by Clark on behalf of the defendant, it was to answer for the debt, default, or miscarriage of Gibson, and, not being in writing, it was void; and (3) that there is a fatal variance between the allegations of the complaint and the proof, in this: That the complaint charges upon an original obligation of the defendant company, whereas the evidence shows a collateral undertaking, if any.

1. As we view this evidence, it is wholly immaterial on this appeal whether Clark had authority to make a contract to pay the debt of Gibson, since the contract, if of that character, is void, not because of the lack of authority in Clark to make it, but because it was not in writing, and falls within the inhibition of section 5017, Revised Codes. If, however, the agreement made between Clark and the officers of the plaintiff company amounted to an original promise, then the question might properly arise: Whose promise was it—the defendant company's or Clark's individual promise? If it was an original promise, and Clark intended to bind the defendant company, and not himself individually, we think there is a presumption that he had the authority to do so, arising from the fact of his employment as president and general manager of the defendant company, and the apparent interest which the company had in seeing Gibson so situated that he could carry out his contract. (Story on Agency, sec. 56.) But whether Clark intended to bind himself or the defendant company was a question of fact for the jury to determine from all that was said and done and from all other surrounding facts and circumstances. (*Gerber v. Stuart*, 1 Mont. 172; 1 Am. & Eng. Ency. of Law, 2d ed., 1121; 31 Cyc. 1553; 2 Ency. of L. & P. 920–923.)

2. Assuming that Clark intended to bind the defendant company by his declaration to the officers of the plaintiff, the appellant contends that the question, Does Clark's statement amount to an original promise to pay for the goods, or merely to a promise to answer for Gibson's debt? is one of law, and

does not involve any element of fact for a jury's consideration. The general rule applicable in such cases is: "Where the question whether the promise was original or collateral depends alone upon its terms, and the language used is established by undisputed testimony, such question is one of law for the court. But the nature of the promise is usually to be determined by the jury as a question of fact, for it may appear that a promise, original in form, was in fact made and intended as collateral, * * * or a promise to be 'responsible' may be found to be collateral, or promises deemed *prima facie* collateral may be adjudged original." (29 Am. & Eng. Ency. of Law, 2d ed., 906.)

If this record presented only the language used by Clark to the officers of the plaintiff company, stripped of any attending facts or circumstances which could possibly throw light upon the intention of the parties at the time, then the only question presented would be one of law. But it is a well-recognized rule that, whenever the language of the promisor was used in connection with other facts and circumstances which can fairly be said to illustrate the language employed, or to throw light upon the intention of the parties at the time the promise was made, then it becomes a question of fact for a jury's determination, under proper instructions, whether the promise was original, or collateral to the promise of a third person. If the promise was original, then the statute of frauds is not applicable; but, if collateral, then it is void unless in writing. In Smith on the Law of Frauds, section 319, it is said: "The subject matter of the promise, the relationship of the parties to the transaction, the language used, the surrounding facts and circumstances, and the intention of the parties as interpreted by their acts in recognition of the promise, its fulfillment, etc., are important elements in determining whether the promise is collateral and subject to the statute, or original and not subject to it."

To attempt to designate all the facts and circumstances which might be the subject of legitimate inquiry in determining the

character of a promise thus made would be a hopeless task. Reference to some of them may be had. It is always proper to inquire whether the promisor had any immediate pecuniary interest in the transaction between the promisee and the person for whose benefit the promise was made. (*Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826.) This court has said: "Wherever the main purpose and object of the promise is not to answer for another, but to subserve some purpose of his [the promisor's] own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another." (*Carothers v. Connolly*, 1 Mont. 433.) When the statute of frauds is invoked, the question of primary importance is: To whom was the credit given? (20 Cyc. 180.) It is the province of the jury to determine to whom the credit was given, and their duty, in so doing, to consider the extent of the undertaking, the expression used, and the circumstances of the case. (*Boykin v. Dohlonde*, 37 Ala. 577.) Whenever from the language employed by the promisor reasonable men might draw different conclusions or inferences, then the intention of the parties at the time the promise was made becomes a subject of legitimate inquiry. "It is often difficult to determine from the mere words in which a promise is made whether an undertaking is collateral to the engagement or liability of a third person, or an entirely independent and original undertaking. In such cases courts must rely on the circumstances of each particular case and its general features, in order to ascertain the intent of the parties and how they viewed it, when it is doubtful whether it was a contract of suretyship or guaranty or an original undertaking." (20 Cyc. 164.) As said by the supreme court of the United States in *Davis v. Patrick*, above: "Counsel for Davis place stress on the form of expression attributed by Patrick to Davis, to-wit: 'I will be personally responsible; I will see you paid'—and contends that the import of such language is that of a collateral promise. There is force in this contention, as it

implies that someone else was also bound; but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties, and the question always is what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise." "It is for the jury to find what the real substance and spirit of the undertaking between the parties was." (Wood on Statute of Frauds, sec. 98.)

Some of the facts which the evidence in this case tends to prove, and from which a jury might infer a primary liability on the part of the defendant company, are: (a) Gibson needed credit, which he sought from the plaintiff company, in order to carry out his contract with the defendant company, and credit was refused him. With knowledge of this fact, the defendant made the promise. For Gibson to get the goods would apparently benefit the defendant company, in that Gibson would thereby be enabled to carry out his contract, and the defendant would get the logs delivered at once, a matter in which it appears to have been concerned. (b) The credit was given to the defendant company exclusively. (c) The defendant paid \$300 on Gibson's account. And (d) defendant asked to be informed of the amount of goods delivered to Gibson. Some of the facts from which a contrary inference might be drawn are: (a) The goods were charged on the plaintiff's books to Gibson, and an itemized statement sent to Gibson every month; (b) the plaintiff wrote to defendant in August that Clark had guaranteed Gibson's account; and (c) after Gibson's contract with defendant company expired, plaintiff extended credit to Gibson on his own responsibility. But all of these facts and circumstances are subject to explanation, and some of them at least are explained. For instance, in explanation of the charge on the books to Gibson, it is said that the defendant company was purchasing goods from plaintiff on credit during the same time that goods were delivered to Gibson, and that the goods so delivered to Gibson were charged to him in order to prevent confusing that account with the account of the defendant company

for goods which it purchased for its own immediate use, and in order that plaintiff might comply with Clark's demand that the defendant company be kept informed of the amount of goods delivered to Gibson. The rule applicable in such a case is well stated, as follows: "Evidence that the goods sold were charged to the person to whom they were delivered strongly tends to show that the vendor gave credit to him, and relied upon him for payment, and therefore that the promise of another to be answerable for the debt was at most a collateral undertaking. However, this evidence is not conclusive, but is open to explanation, and the weight of it is for the jury." (20 Cyc. 183.) Treating of this particular phase of the case under similar circumstances, the supreme court of Oregon, in *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974, said: "It is enough to say that it was to prevent confounding the accounts, as already explained, that the charges were thus made on the books. With this explanatory evidence, the referee, who stands in the place of the jury, was satisfied; and, as it was proper evidence to be considered by him, it is not for us to weigh it or revise his findings."

It is urged by appellant that the evidence shows that at the time Clark is alleged to have made this promise, Gibson was getting goods from another firm in Plains; and this is true, but it does not appear to what extent Gibson was dealing with Peterson & Kruger, or whether he was paying cash or obtaining credit.

It is likewise urged that the evidence is not sufficient to show that the defendant company had such an immediate pecuniary interest in the transaction between Gibson and the plaintiff as would furnish a consideration for defendant's promise. But we think this is a question of fact for the jury. The evidence tends to show that the defendant company had a pecuniary interest in having the logs removed at once; that it had endeavored to secure the services of at least one other person to do the work, but, the price not being satisfactory, it finally contracted with Gibson. Since it was necessary for Gibson to obtain the goods in order to carry out his contract at all, and his

failure might result in financial loss to the defendant company, it might be a reasonable inference from these facts that the leading object which defendant had in view in giving its assurance to plaintiff under the circumstances was to subserve or promote its own interest, even though such assurance had the effect of paying what would otherwise have been the debt of Gibson and particularly is this so in view of the further fact that Gibson's performance of the contract would render defendant his debtor, and it could protect itself in its settlement with him if the proceeds of the contract would defray the expense.

Counsel for appellant further contends in his brief that: "The evidence must show that the credit was extended exclusively to the promisor, and that the third party was absolutely discharged from liability, in order to take the promise out of the statute of frauds." With the first part of this statement we fully agree. The rule is stated as follows: "But in all such cases it is requisite that credit should be given exclusively to the promisor; if any credit be given to him for whose benefit the promise is made, the promisor is not liable unless his promise is in writing; and this is so although the collateral undertaking may have been the principal inducement to the delivery of the goods or the performance of the services." (20 Cyc. 181.) But the authorities cited by counsel do not sustain the proposition that, in addition to showing that credit was extended to the promisor exclusively, it must also appear that the third party was released from liability. At first blush some of the cases would seem to support that contention, but a careful analysis will disclose that they do not go further than to hold to the general rule just quoted above. The effect of an original promise is to make the promisor the debtor in the first instance, even though the goods sold be for the benefit of another. It would be absurd to say in this case that credit was extended solely to the defendant company, and Gibson was released from liability; for if the defendant company was an original promisor—that is, if it was the only debtor in the first instance—then there never was any liability to be released. (Browne on

the Statute of Frauds, sec. 162.) It is only when one agrees to pay the *pre-existing* debt of another that the principle of law invoked by appellant is applicable (20 Cyc. 186); and that principle has no application to the facts of this case, because defendant's promise, if made at all, was to pay for goods thereafter to be delivered to Gibson, and not to pay a pre-existing debt of Gibson's.

The language employed by plaintiff in its letter to the defendant, in August, 1908, would seem to indicate that plaintiff then considered the defendant a guarantor of Gibson's debt; but the courts are not inclined to decide these cases upon the mere form of expression employed by either the promisor or promisee, unless the words stand alone, unaided by any facts or circumstances, and the reason for this is obvious. The average layman does not weigh his words in the light of technical legal definitions, and could hardly be expected to distinguish between an original and a collateral promise.

Whatever construction may be put upon subdivision 2 of section 5660, Revised Codes, we think the provision is not applicable to the facts so far as disclosed in this case. The case of *Mel-drum v. Kenefick*, 15 S. D. 370, 89 N. W. 863, presents facts to which this subdivision is clearly applicable.

Upon the several propositions which we have discussed under this assignment, the authorities are not altogether harmonious. But we think our views have the support of the decided weight of authority, and appear to us most consonant with reason. In view of these rules the trial court should have denied the motion for a nonsuit; but, not having done so, on consideration of the motion for a new trial it very properly reached the conclusion that the cause should have been submitted to the jury. What we have said under this assignment disposes of the third one also.

In our consideration of this appeal we have treated the evidence from the standpoint of the trial court at the time the motion for nonsuit was interposed; that is to say, we accept the evidence as true for the purpose of this appeal, and view

it in the light most favorable to plaintiff. This is the rule in this state.

We do not find any error in the trial court's ruling. The order granting a new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.



VON TOBEL, RESPONDENT, v. CITY OF LEWISTOWN, APPELLANT.

(No. 2,818.)

(Submitted April 9, 1910. Decided April 28, 1910.)

[108 Pac. 910.]

Cities and Towns—Streets—Dedication—Estoppel in Pais.

1. Where defendant city had for more than twenty years permitted plaintiff to remain in undisturbed possession of, and put permanent improvements upon, a piece of land, after an alleged dedication of a portion thereof for street purposes, and great injury would result to plaintiff's premises from the opening of a street through them, the doctrine of estoppel *in pais* is applicable, and the city may not be heard to assert its right to devote to public use, without compensation to the owner, the portion of the property desired for street purposes.

Appeal from District Court, Fergus County; Frank Henry, Judge of the Sixth Judicial District, presiding.

SUIT by Rudolf Von Tobel to enjoin the city of Lewistown from taking a portion of plaintiff's property for street purposes. From a decree for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

In behalf of Appellant, there was a brief and oral argument by *Mr. Wm. M. Blackford*.

“Dedication is the act of devoting or giving property for some proper public object, in such manner as to conclude the

owner.” (5 Am. & Eng. Ency, of Law, 1st ed., 395.) A road or street which is a mere *cul de sac* may be dedicated to the public use in the same manner as a thoroughfare. (*Stone v. Brooks*, 35 Cal. 489, 498; *Smith v. City of San Luis Obispo*, 95 Cal. 467, 30 Pac. 591; *People v. Kingman*, 24 N. Y. 559; *Sheafe v. People*, 87 Ill. 189, 29 Am. Rep. 49; *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 602, 19 L. R. A. 262; *Schatz v. Pfeil*, 56 Wis. 429, 14 N. W. 628; *Cemetery Assn. v. Meninger*, 14 Kan. 312; *Masters v. McHolland*, 12 Kan. 17.) The 1884 plat substantially complied with the provisions of the law of this state then in force. It contained the proper certificate of dedication, signed by the proprietors of the ground platted, and was duly acknowledged and certified, and as such was entitled to be recorded. (*London & San Francisco Bank v. City of Oakland*, 90 Fed. 696, 33 C. C. A. 237.) It contained the names of the streets, and the width of all streets and alleys was given according to the surveyor's scale of one hundred feet to the inch. If there is enough appearing on the face of the plat to determine the width of the streets and alleys, it is sufficient. Surveyors' terms are sufficient to indicate the width of streets and alleys. (*Town of Lake View v. LeBahn*, 120 Ill. 92, 9 N. E. 272; *Taraldson v. Town of Lime Springs*, 92 Iowa, 187, 60 N. W. 658.) By reference to the plat in the deed to plaintiff, his grantors adopted it, and he, claiming under such deed, is held and bound by it. By reference, they made it a part of said deed. (*London & San Francisco Bank v. City of Oakland*, 90 Fed. 691, 697, 33 C. C. A. 237; *Meier v. Portland C. Ry. Co.*, 16 Or. 500, 19 Pac. 610, 612, 1 L. R. A. 856; *Town of Derby v. Alling*, 40 Conn. 410; *Giffen v. City of Olathe*, 44 Kan. 342. 24 Pac. 470; *Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167, 170.)

Substantially all of the decided cases, whether based upon strict or liberal construction of what constitutes a dedication, show beyond controversy that the facts proven in this case are eminently sufficient to show a complete dedication of the streets and alleys within the boundaries of the lands de-

scribed in the complaint. We cite below a few of the many leading cases upon this question: *Shea v. City of Ottumwa*, 67 Iowa, 39, 24 N. W. 582; *Meier v. Portland C. Ry. Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *London & San Francisco Bank v. City of Oakland*, 86 Fed. 30, 90 Fed. 691, 33 C. C. A. 237; *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1089; *Giffen v. City of Olathe*, 44 Kan. 342, 24 Pac. 470; *Heitz v. City of St. Louis*, 110 Mo. 618, 19 S. W. 735; *Maywood Co. v. Village of Maywood*, 116 Ill. 61, 6 N. E. 866; *Harn v. Common Council of Dadeville*, 100 Ala. 199, 14 South. 9; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *Rhodes v. Town of Brightwood*, 145 Ind. 21, 43 N. E. 942; *Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167; *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

Upon the question that a municipality is not obliged to signify its acceptance of a dedication of a street until it is required for use and that acceptance is in time, if made before the offer to dedicate is withdrawn, the following cases are in point: *London & San Francisco Bank v. City of Oakland*, *supra*; *Coffin v. City of Portland*, 27 Fed. 412; *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398, 80 N. W. 1101; *Giffen v. City of Olathe*, 44 Kan. 342, 24 Pac. 470; *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088; Elliott on Roads and Streets, p. 89; *Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167; *Harn v. Common Council of Dadeville*, 100 Ala. 199, 14 South. 9; *Meier v. Portland C. Ry. Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *Attorney General ex rel. Adams v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; *Town of Derby v. Alling*, 40 Conn. 410, 432; *Heitz v. City of St. Louis*, 110 Mo. 618, 19 S. W. 736; *Taraldson v. Town of Lime Springs*, 92 Iowa, 187, 60 N. W. 658; *Flersheim v. Mayor*, 85 Md. 489, 36 Atl. 1098; 2 Abbott's Municipal Corporations, sec. 737, and authorities.

That opening and improving a part of a street is an acceptance of the entire street, see the following authorities: *Town of Derby v. Alling*, *supra*; *London & San Francisco Bank v. City of Oakland*, *supra*; *Town of Lakeview, v. LeBahn*, 120 Ill. 92,

9 N. E. 269; *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398, 80 N. W. 1101; *Heitz v. City of St. Louis*, 110 Mo. 618, 19 S. W. 735; *Giffen v. City of Olathe*, 44 Kan. 342, 24 Pac. 470.

Occupation by a private individual for the following periods of time, after the making of the plat and dedication of a street or highway before any attempt was made to open and use it as a street or highway, has been held not to show laches on the part of the city or town, or an abandonment of the right of the public to its use: Forty-three years, in *City of Racine v. Chicago & N. W. Ry. Co.*, 92 Wis. 118, 65 N. W. 857; *London & S. F. Bank v. City*, *supra*; thirty years, in *Shea v. City of Ottumwa*, 67 Iowa, 39, 24 N. W. 582; twenty-six years, in *Boise City v. Hon*, *supra*; twenty-three years, in *Mayor of Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435; *Flersheim v. Mayor*, 85 Md. 489, 36 Atl. 1098; fifteen years, in *Giffen v. City of Olathe*, *supra*; thirty-one years, in *Russell v. City of Lincoln*, *supra*.

The statute of limitations of this state, so far as it affects this action, if at all, is the same as that of California. There no one can acquire by adverse possession, as against the public, the right to obstruct a street dedicated to public use, and thus prevent the use of it as a public highway. (See *London & San Francisco Bank v. City of Oakland*, *supra*; *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 1088; *Taraldson v. Town of Lime Springs*, 92 Iowa, 187, 60 N. W. 658; *Harn v. Common Council of Dadeville*, 100 Ala. 199, 14 South. 9; *Mayor of Baltimore v. Frick*, *supra*; *Walker v. Caywood*, 31 N. Y. 51; *Grogan v. Town of Haywood*, 4 Fed. 161, 6 Saw. 498; Elliott on Roads and Streets, 2d ed., sec. 882 *et seq.*)

Mr. O. W. Belden, and *Mr. Rudolf Von Tobel*, filed a brief in behalf of Respondent; oral argument by both.

Both in the answer and at the trial of the case, appellant expressly disclaimed any right to rely upon either the 1882 plat or the 1890 plat as constituting a statutory dedication, but relied upon a common-law dedication of the ground in con-

troversy. To constitute a dedication at common law, there must be both an intention to dedicate by the owner and an acceptance of the dedication by the public. (*Spalding v. Bradley*, 79 Cal. 449, 22 Pac. 47; *Helm v. McClure*, 107 Cal. 199, 40 Pac. 437; *People v. Jones*, 6 Mich. 182; see extensive note in 57 Am. St. Rep. 753, "Acceptance.") Filing a map and having the same recorded is a mere offer of dedication and is revocable until accepted. (*Hayward v. Manzer*, 70 Cal. 476, 13 Pac. 141; *People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Phillips v. Day*, 82 Cal. 30, 22 Pac. 976.) An acceptance by the public must be made within a reasonable time, or it will be presumed to be revoked. (*People v. Reed*, 81 Cal. 70, 15 Am. St. Rep. 22, 22 Pac. 474; *Hayward v. Manzer*, 70 Cal. 476, 13 Pac. 141; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Field v. Manchester*, 32 Mich. 279; Dillon on Municipal Corporations, 4th ed., sec. 632; *Wolfskill v. Los Angeles Co.*, 86 Cal. 405, 24 Pac. 1094; *San Francisco v. Canavan*, 42 Cal. 541; *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; *City of Denver v. R. R. Cos.*, 17 Colo. 584, 31 Pac. 338.) It has been held that a failure to accept within a certain specified time is an abandonment of the offer. (See *Gardiner v. Tisdale*, 2 Wis. 253, 60 Am. Dec. 418; *Forsyth v. Dunnagan*, 94 Cal. 438, 29 Pac. 770 (nonacceptance for a period of nine years); *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 277, 42 N. W. 183.)

There are many cases which hold that the statute of limitations runs against a municipality the same as against an individual. However, the legislature of Montana has seen fit to enact a statute of limitations running against the state and, *ipso facto*, against every portion of the state (Revised Codes, sec. 6429), which, we maintain, applies to the present case.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was brought to obtain an injunction restraining the city of Lewiston from opening or attempting to open a public

street through certain premises claimed by the plaintiff. The plaintiff alleges that he is, and for more than twenty years last past has been continuously, the owner and in possession of certain lands situated within the corporate limits of the city of Lewistown (then follows a description by metes and bounds); that Third avenue in said city abuts on his property, and that about August 16, 1907, the city, without any right and against the will of the plaintiff, tore down his fence inclosing his property and threatens to, and, unless restrained, will, open and extend Third avenue through his property for a distance of about three hundred feet. The answer admits that defendant tore down plaintiff's fence, that unless restrained it will open and extend Third avenue through his premises; but denies that in so doing it has acted or will act wrongfully. The answer then contains new matter by way of defense, to the effect that in 1882 Francis A. Janeaux and wife were the owners of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, township 15 N., range 18 E., in Meagher (now Fergus) county; that they then caused a portion of said land to be surveyed and platted as a townsite, and a plat thereof to be duly filed in the office of the county clerk and recorder; that one of the avenues surveyed, staked out, and made to appear on said plat was and is the Third avenue mentioned above; that thereafter, in 1884, the said Janeaux and wife again caused the said lands to be surveyed, staked out, marked and platted, and a plat thereof to be filed in the office of the county clerk and recorder; but, by mistake, the plat and indorsements thereon made it appear that the land so surveyed and platted was the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 15, whereas it was intended to represent the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section; that thereafter, on August 20, 1890, for the purpose of correcting the erroneous description, an amended map or plat was filed; that in making the surveys, marking and designating the lots, blocks, streets, avenues, and alleys, and in filing the plats, it was the intention of the owners to "devote, remise, grant, quitclaim, convey and dedicate the streets, avenues and alleys thus staked off, laid out, marked,

and designated to the public for its use and benefit forever." It is then alleged that in 1886 the plaintiff purchased from Francis A. Janeaux and wife the land now claimed by him, and received a deed therefor which described the land by metes and bounds, which description concludes: "Except the streets and alleys contained thereon." It is further alleged that within the exterior boundaries as given in the deed above there was a portion of Third avenue, a portion of Water street, and a portion of the alley which passes through block S22, and that the respective portions of said avenue, street, and alley were expressly excepted from the grant contained in the deed to plaintiff. It is then alleged that the public accepted the dedication of the streets, avenues and alleys, and, as rapidly as the same could be, they were improved and used by the public. Most of these affirmative allegations were put in issue by reply. There is in the reply also a plea of the bar of the statute of limitations, a plea of estoppel *in pais*, and an attempt to plead title by adverse possession. The trial court found in favor of plaintiff on his plea of adverse possession, and further found that the evidence was not sufficient to show that any of that portion of Third avenue in question had ever been dedicated to the public as a street, highway or otherwise. From the findings made the court concluded that the acts of the defendant city in attempting to extend Third avenue through plaintiff's property were wrongful, and that plaintiff was entitled to a permanent injunction restraining the city from further interfering with his possession of that particular portion of his property. From the decree entered in favor of plaintiff and from an order denying it a new trial, the city appeals.

Much of the argument of counsel for the respective parties is devoted to a consideration of two questions: (1) What is necessary to constitute a valid and effective dedication of a street; and (2) does the statute of limitations run against a municipal corporation with respect to property held in trust for the public use? While a discussion of these questions would involve many interesting legal propositions, we do not deem it

necessary to consider either of them to any great extent. This is a suit in equity, and the evidence is all before us. It therefore devolves upon us to make such disposition of the questions involved as the exigency of this particular case requires.

The record discloses that in 1882 Janeaux and wife filed the first plat of the original townsite of Lewistown. At that time there was not any statute authorizing such procedure. Therefore the acts done by the owners of the property in that year could not amount to a statutory dedication of the streets, avenues and alleys; furthermore, the 1882 plat does not embrace the premises now in controversy, and, so far as this case is concerned, all evidence touching that survey and the proceedings had thereon is of little or no value. In 1884, after the passage and approval of the Act of February 19, 1883, authorizing the laying out of townsites on private property, Janeaux and wife caused a portion of forty acres to be surveyed, staked out, and platted, and a plat thereof to be filed with the county clerk and recorder, but by a mistake that plat and indorsements thereon are made to describe and represent land a quarter of a mile away from the original townsite of Lewistown. In several minor particulars the proceedings taken at that time did not conform to the statutory requirements. This, then, was the condition of affairs when, in 1886, this plaintiff purchased the land now claimed by him, went into possession, and commenced improving the same. In 1890 the mistake in the 1884 plat was discovered, and an attempt was made by the administratrix of the Janeaux estate to correct the same by having another plat filed; but the evidence fails to show that any authority was sought or obtained from the probate court for the proceedings taken. From the evidence presented in this record we are left somewhat in doubt as to whether Third avenue, where it passes through the property claimed by plaintiff, was ever actually surveyed. McFarland, who made the survey for Janeaux and prepared the 1884 and 1890 plats, testified that he could not remember whether he established the corners along that portion of Third avenue. But these facts are

recited only for the purpose of showing that at the time plaintiff purchased the property, and went into possession of it, it was at least doubtful whether any attempt had been made to dedicate that portion of Third avenue to the public use. In view of these conditions, and the fact of the proximity of this property to the business center of the city; the fact that Third avenue, before it reaches the boundaries of plaintiff's property, has been during all these years practically cut off and terminated by a creek and slough, and that it will require great expenditure of time and money to improve it; the further fact that there is some evidence that the survey of the original town-site did not extend to the east line of the forty-acre tract, and therefore the city would be without authority to connect this avenue with any other street or alley, or, to speak more accurately, would be confronted with a strip of land from thirty to thirty-five feet in width, extending diagonally across this avenue, to which strip of land the plaintiff appears to have a good title—all lead us to entertain a serious doubt whether the city ever intended to assert any claim to this particular portion of Third avenue, so called, until this controversy arose. And in view of the fact that for more than twenty years the city has lain by and without objection has permitted plaintiff to occupy this portion of the so-called Third avenue and at considerable expense to place permanent improvements thereon, and the fact that the plaintiff must sustain great injury in having a portion of his premises segregated from the rest, by the opening of this avenue, that he would be compelled to remove his barn and other outbuildings, and would suffer his trees, vines and shrubbery to be destroyed, it would seem extremely inequitable for the city at this late date to assert its right to devote to public use, without compensation to the plaintiff, a portion of this property which he has so long claimed and the undisputed possession of which he has so long enjoyed. Under these circumstances, we think the city should be, and is, estopped to assert the claim which it now makes.

In 2 Dillon on Municipal Corporations, fourth edition, section 675, it is said: "The author cannot assent to the doctrine that,

as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require." Acting upon the doctrine of this text, the courts have repeatedly applied to municipal corporations the doctrine of equitable estoppel, and we think it peculiarly applicable here. (*John Mouat Lumber Co. v. City of Denver*, 21 Colo. 1, 40 Pac. 237; *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; *Orr v. O'Brien*, 77 Iowa, 253, 14 Am. St. Rep. 277, and note, 42 N. W. 183; *Chicago & N. W. Ry. Co. v. People ex rel. Elgin*, 91 Ill. 251; *Piatt County v. Goodell*, 97 Ill. 84; *Hamilton v. State*, 106 Ind. 361, 7 N. E. 9; *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449, 61 N. W. 1108.)

Without determining whether the trial court was correct upon the theory which it adopted, we approve the result, but prefer resting our decision upon the application of the doctrine of estoppel *in pais*. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

POOR, ADMINISTRATOR, RESPONDENT, v. MADISON RIVER
POWER CO. ET AL., APPELLANTS.

(No. 2,819.)

(Submitted April 8, 1910. Decided April 28, 1910.)

[108 Pac. 645.]

Personal Injuries—Electric Wires—Instructions—Harmless Error—Special Interrogatories—Discretion—Jury.

Appeal—Instructions—Objections and Exceptions—Review.

1. Under subdivision 5 of section 6746, Revised Codes, the supreme court cannot reverse a judgment and direct a new trial for error in an instruction, unless at the time of settlement in the trial court specific objection was made to it, pointing out the error alleged, and an exception preserved to the action of the court in overruling the objection.

Personal Injuries—Instructions—Conformity to Issues—Harmless Error.

2. Though the district court erred, in an action to recover damages for the death of an employee occasioned by coming in contact with a highly charged electric wire, in submitting an instruction upon an issue of negligence not involved in the case as tried, such error was non-prejudicial to defendant, in view of the fact that the instruction placed an additional burden upon plaintiff which, under the theory of the case, he was not bound to assume.

Trial—Special Interrogatories—Discretion.

3. The submission of special interrogatories to the jury is a matter confided to the discretion of the district court.

Same—Special Interrogatories—Improper Form.

4. A special interrogatory involving two questions, one of which might, under the testimony, have been answered in the affirmative, while to the other an affirmative or negative answer could have been given, was improper.

Same—Special Interrogatories—Withdrawal.

5. By accepting a general verdict without requiring the jury to answer a special interrogatory submitted to them, the court in effect withdrew it from their consideration, which it was within its discretion to do.

Same—Jury—Discharge—Recall.

6. After the jury has been finally discharged from consideration of a case, they may not, except upon consent of all parties, be recalled to answer a special interrogatory submitted to them but which they failed to answer when returning their verdict.

Appeal—Conflicting Evidence—Verdict—Conclusiveness.

7. The verdict of the jury will not be disturbed on appeal on the alleged ground that the evidence is insufficient to justify it, where from the testimony before them they could have found the issues in favor of either party.

(MR. JUSTICE SMITH dissenting in part.)

'Appeal from District Court, Gallatin County; J. M. Clements, Judge of the First Judicial District, presiding.

ACTION by J. R. Poor, as administrator of Amos R. Howerton, deceased, against the Madison River Power Company and another. From a judgment for plaintiff and an order denying a motion for new trial, defendants appeal. Affirmed.

Messrs. Hartman & Hartman, Messrs. Maury & Templeman, and Mr. J. O. Davies, submitted a brief in behalf of Appellants. *Mr. H. L. Maury* argued the cause orally.

In behalf of Respondent, there was a brief and oral argument by *Mr. George Y. Patten*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by the plaintiff as administrator of Amos R. Howerton, deceased, for damages for the death of said Howerton, caused by his coming in contact with a highly charged wire in the electric substation of defendant at Bozeman, in Gallatin county, while he was in the employ of the defendants therein as a carpenter. A statement of the case sufficient to give a clear idea of the issues involved will be found in the opinion of this court on a former appeal. (38 Mont. 341, 99 Pac. 947.) At the close of the evidence on the first trial, the district judge, on motion of defendants, directed a verdict in their behalf. The judgment entered thereon and an order denying plaintiff's motion for a new trial were reversed by this court, and a new trial ordered, on the ground that the court erred in withdrawing the case from the jury. A second trial resulted in a verdict and judgment for the plaintiff. The case is now before this court upon defendants' appeal from the judgment and order denying their motion for a new trial. Though before the trial the complaint was amended in some particulars, the issues remained substantially the same. The evidence introduced on the trial was also substantially the same, except as will hereafter be noted.

In the paragraph of the opinion devoted to a consideration of the issues involved this court on the former appeal, speaking

through Mr. Justice Smith, said: "Appellant's counsel contend that under the admissions in the pleadings and the undisputed proofs on the trial there was and is only one question in the case, namely, whether Howerton was warned of the danger; and we are inclined to agree that this is the principal question involved. No complaint is made that the substation was not properly constructed, or that any of the appliances were defective or insufficient. It is alleged in the complaint, and tacitly admitted in the answer, that the wires were dangerous. * * *

The real grievance complained of is the failure to warn the plaintiff of the danger, inasmuch as he was ignorant of it. * * *

The question of the failure of the defendants to furnish approved or different appliances is not in the case." At the trial the parties proceeded upon the theory of the case thus outlined, the plaintiff undertaking to show that the defendants, knowing and appreciating the dangerous character of the place, employed Howerton, the deceased, who was ignorant of its character, and directed him to work there without warning him of the danger or giving him information with respect to it, and were thus guilty of actionable negligence. The defendants sought to show that the deceased was not only sufficiently warned of the danger lurking in the place, but fully understood and appreciated it. Of course, having adopted this theory of the case, both parties proceeded upon the assumption that the place was dangerous, and necessarily so from the nature of the agency employed, and not because of any negligence on the part of the defendants in maintaining it as they did.

The principal contention now made is that the district court erred in its instructions in submitting the case to the jury. Our attention is called especially to instruction 8, requested by the plaintiff, and instruction 13, requested by defendants. These are as follows:

"No. 8. You are instructed that if you believe from a preponderance of the evidence that the defendants were guilty of negligence in failing to provide the deceased, Amos R. Hower-

ton, with a reasonably safe place in which to perform his work, and that said deceased did not know or appreciate the danger to which he was subjected in the place where he was working, and was not warned thereof by the defendants, or either of them, and under the circumstances as a reasonably prudent man ought not to have known or appreciated the danger at the place where he was working, and while engaged in his work for the defendant Madison River Company he was killed by reason of the unsafe place in which he was permitted by defendants to work, and their failure to warn him of such danger, your verdict should be for the plaintiff."

"No. 13. The complaint does not charge, nor the plaintiff contend, that the defendants were negligent because they maintained and operated their power-house and high tension wire-upon which Howerton met his death in the manner in which the evidence shows the same were maintained and operated, and, in fact, that the same was maintained and operated as the evidence shows it was, does not constitute negligence. The negligence charged is the failure to warn Howerton of the dangerous condition of the wire and the putting him to work at a place in the power-house where he might be expected to come in contact with the wire. It is therefore not sufficient for the plaintiff to show the maintenance of the wire upon which Howerton met his death in the position in which the evidence shows it to have been. He must also show that Howerton had not sufficient knowledge of the dangers of the wire to appreciate the danger to himself in coming in contact with the same; that the defendants, or either of them, failed to warn him of such dangers, and permitted or ordered him to go to work at a point in the power-house where he might come in contact therewith, and this must be shown by a fair preponderance of the evidence."

The specific objection made to the former of these instructions is that the first clause of it, ending with the words "in which to perform his work," is erroneous, in that it has reference to an issue not involved in the case, and is therefore mis-

leading. In the argument in the brief counsel insist that this portion of it amounted to a peremptory direction to the jury to find for the plaintiff, and, besides, is in direct conflict with instruction 13. Under the statute (Revised Codes, sec. 6746, subd. 5), this court cannot reverse a judgment and direct a new trial for error in any instruction, unless specific objection was made to it, pointing out the error alleged, at the time of settlement in the trial court, and an exception preserved to the action of the court in overruling the objection. For present purposes it may be conceded that the two instructions are in substantial conflict. Even so, under the rule declared by the statute, the error thus committed cannot be made a ground of reversal. (*Yergy v. Helena L. & Ry. Co.*, 39 Mont. 213, 102 Pac. 310; *Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837; *Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038.)

Instruction No. 13 was formulated upon the theory that it was only incumbent upon the plaintiff to establish (1) that Howerton had not sufficient knowledge of the character of the place to appreciate the danger; and (2) that the defendant permitted or directed him to work there without warning him of the danger so that he might guard against it. This is entirely in accord with the theory developed by the parties in introducing their evidence. The portion of instruction No. 8 to which the objection was directed did submit to the jury an issue which had been eliminated from the case. Under it, in order to recover, the plaintiff must have shown (1) that defendants failed to furnish the plaintiff a reasonably safe place in which to work; (2) that plaintiff did not know of the dangerous conditions existing there and appreciate them; and (3) that defendants permitted and directed him to work there, without warning him of the danger. In view of the theory upon which the parties proceeded, the court should have assumed that the defendants' wires, highly charged, as they were, with electricity, were dangerous, and told the jury definitely that such was the case. It should also have informed them that the

plaintiff did not claim that the defendants were negligent in maintaining them as they did. It should then have required them to find upon the remaining two issues. Thus the incongruity contained in this instruction would have been eliminated. In effect, however, the incongruity could not have prejudiced the defendants. It merely required the jury to find as an essential element of plaintiff's right to recover an additional fact which it was not necessary to find, to-wit, that the defendants were guilty of negligence in maintaining the place as they did. This cast a burden upon the plaintiff which he was not bound to assume. Since this was so, the defendants, in view of plaintiff's admission that they were not in fact negligent in maintaining the place, were put in a more advantageous position than they otherwise would have been, had the issue been entirely eliminated; for, under this instruction, standing alone, though the jury had found that deceased was ignorant of the conditions, and that defendants failed to warn him of them, they must still have found for the defendants, unless they further found that the defendants were negligent in maintaining the place as they did. Such being the situation, the defendants cannot complain.

At the request of defendants, the court submitted to the jury the following special interrogatory: "Did the witness Barclay, in the presence of Amos R. Howerton, make an experiment and at the same time explain to said Howerton the dangerous nature of the wire on which Howerton was killed?" The witness mentioned had not testified at the previous trial. At the time the accident occurred, he was employed by the defendant company for general work about the substation. He testified that during the time of his employment there he and Howerton and McCabe, another carpenter employed with Howerton, had discussed the dangerous character of the wire with which Howerton came in contact; that by an experiment then conducted by the witness, in their presence, in another place in the station, he had shown them how the current would leave the wire when another conductor was brought near it; and that

he told them that the wire used in the experiment was the same one which passed near the place where Howerton was working. He stated, further, that both Howerton and McCabe said at the time that they realized that it was dangerous to come in contact with a charged wire, and that they would thereafter keep away from it. It was admitted by McCabe that the experiment was conducted by Barclay, but he stated that nothing was then said about any danger or that the wire was the same as that by which Howerton was killed. The purpose of the interrogatory was to have the jury find from the testimony of Barclay that Howerton had been fully warned of the danger and fully appreciated it. The jury failed to answer it, and the court accepted the general verdict without requiring them to do so, and discharged them. At that time Mr. Hartman, one of counsel for defendants, who had taken no active part in the trial, was present, but did not know of the submission of the interrogatory. A few days after the trial, counsel moved the court to recall the jury and require them to answer it. This motion was denied. It is argued that the action of the court in the premises was such an irregularity as to warrant the granting of a new trial. There is no merit in this contention. Under the statute (Revised Codes, sec. 6758) the court may, in its discretion, submit to the jury a particular question of fact, and require them to find upon it; but it is not bound to do so. (*Hollingsworth v. Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142.) The interrogatory, in the form in which it was drawn, should not have been submitted to the jury in the first instance, because it involves two questions, the first of which must upon the testimony of Barclay and McCabe have been answered in the affirmative, while the second might have been answered in the affirmative or negative. The direct tendency of such an interrogatory was to confuse the jury, rather than to elicit the finding of a single material ultimate fact, to-wit, that Barclay fully explained to Howerton the dangerous character of the wire. (*Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652.) And, if upon further

consideration of it the court had formally withdrawn it from the jury, no valid objection could have been taken to its action. Even had it been in proper form, its withdrawal could not have been made the ground of exception, because, it being within the court's discretion to submit it in the first instance, it could likewise in its discretion withdraw it. (*Florence Machine Co. v. Daggett*, 135 Mass. 582.) This was in effect what was done by the reception of the general verdict, without requiring an answer by the jury. (*Robinson v. Palatine Ins. Co.*, 11 N. M. 162, 66 Pac. 535; *City of Wyandotte v. Gibson*, 25 Kan. 236; *New York etc. Nat. Bank v. American Surety Co.*, 69 App. Div. 153, 74 N. Y. Supp. 692.) Nor was the refusal of the court to recall the jury error of which defendants may complain. They had been finally discharged from consideration of the case, with the result that they had become again members of the community at large, freed from the obligations of their official oaths, and could not have been recalled except upon consent of all the parties. The interrogatory involved consideration of one of the fundamental issues in the case. To recall them after their discharge and to require them to answer it would have been tantamount to a resubmission of the whole case to a body of men not bound by the obligations of an oath, which would clearly have been violative of the plaintiff's right to a trial by a jury selected and sworn in the mode pointed out by the statute. (*Williams v. People*, 44 Ill. 478.)

It will not be necessary to enter into an analysis of the evidence to answer the contention of the defendants that it is insufficient to justify the verdict. In the opinion on the former appeal the testimony of McCabe and Davidson, the principal witnesses, is stated in full. With reference to the contention then made that the evidence did not disclose the manner and efficient cause of Howerton's death, it was said: "It is reasonably certain that Howerton's death was due to contact with the highly charged wire; and, if the jury believed McCabe's testimony, they might have concluded that deceased was engaged in doing what he was directed to do by the defendants,

and had no knowledge that there was any danger to be apprehended from touching the wire." The evidence adduced by the parties on the second trial was substantially the same as at the first, except that of Barclay and McCabe touching the experiment conducted by the former. This pertains exclusively to the question whether Howerton was informed of the danger of coming in contact with the charged wire, and the statements of these witnesses are in direct conflict. The jury might have found one way or the other, not only as to the manner and cause of the death, but also upon the issue as to whether Howerton knew of and appreciated the danger. Upon this condition of the record we may not disturb the verdict.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: I am unable to agree with my associates in the disposition made of the specifications of error arising upon the instructions in this case. Upon a retrial but one question was presented: Did the defendants negligently omit to warn Howerton of the danger? This was a question to be determined by the jury under proper instructions. Instruction No. 8 was erroneous, and in my judgment prejudicial, because it introduced into the case an element of alleged negligence which had no foundation in the testimony. I could agree with the majority opinion as to the effect of this instruction, if the district court had in any other instruction directed the attention of the jury to the only act of negligence upon which a recovery could be predicated; that is, a negligent failure to warn. As it is, the jury must either have based their verdict upon a negligent failure to provide a reasonably safe place in which to work (a matter which was confessedly not in the case), or upon a failure to warn, regardless of whether or not such failure involved an act of negligence. Assuming that the jury followed that portion of instruction No. 13 wherein they were told that no claim was made that the defendants were guilty of negligence in maintaining and operating the power-

house and high tension wire, then we have a verdict and judgment against the defendants in a case in which they have been convicted of no negligent act. While this point was not specifically raised in the objections to instruction No. 8, still I think it is fairly comprehended within the objections, for the reason that the court's attention was called to the fact that the only alleged act of negligence upon which it was proposed to instruct the jury was outside of the issues. This is, in my judgment, a very close case upon the facts, and, believing as I do that the jury's attention was never directed to the real and only issue in the case, I respectfully dissent from the orders of affirmance.

UNITED MISSOURI RIVER POWER CO., APPELLANT, v.
YODER, RESPONDENT.

(No. 2,848.)

(Submitted April 11, 1910. Decided May 2, 1910.)

[108 Pac. 912.]

*Foreign Corporations—Increase of Capital Stock—Certificate—
Filing Fee—Secretary of State.*

1. Each of two foreign corporations, one with a capital stock of \$10,250,000, and the other with one of \$2,000,000, upon entering the state to transact business had paid the full legal fees for filing its articles of incorporation. Subsequently the former absorbed the latter and increased its capital stock, the certificate presented to the Secretary of State for filing showing its capitalization then to be \$14,000,000. *Held*, that the secretary was not required to deduct the amount of the capital stock of the absorbed corporation—upon which the fees had once been paid—from the amount shown by the certificate of increase, but properly charged a fee based upon the difference between its former capitalization and the present one.

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

ACTION by the United Missouri River Power Company against A. N. Yoder, Secretary of State. Judgment for defendant, and plaintiff appeals. Affirmed.

Mr. William Wallace, Jr., submitted a brief in behalf of Appellant and argued the cause orally.

In behalf of Respondent, there was a brief by *Mr. Albert J. Galen*, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, and oral argument by the latter.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to January, 1910, the United Missouri River Power Company and the Capital City Power Company were New Jersey corporations, doing business in this state, the former with a capital stock of \$10,250,000, and the latter with a capital stock of \$2,000,000. The former company owned a majority of the stock of the latter, and by an agreement made on January 26, 1910, pursuant to a statute of New Jersey, there was effected a merger of the two companies, by which the Capital City Power Company was literally absorbed by the other concern. The agreement provides for the purchase, by the United Missouri River Power Company, of all the property, rights, privileges, and franchises of the Capital City Power Company, the surrender and cancellation of the certificates representing the capital stock of the Capital City Power Company, and the issuance, to the holders thereof, of certificates representing shares of stock in the United Missouri River Power Company. The agreement further provides that thereafter the capital stock of the United Missouri River Power Company shall be \$14,000,000. On March 3, 1910, a duly authenticated copy of the agreement was tendered to the Secretary of State of Montana for filing, together with the sum of \$380 as the filing fee. Upon demand of the Secretary of State, an additional sum of \$200 was paid under protest, and this action was commenced to recover back said sum of \$200. The cause was submitted to the district court upon an agreed statement of facts, and judgment was rendered and entered in favor of the defendant, dismissing the action. From that judgment the plaintiff appeals.

The question presented to us is: Upon what basis should the Secretary of State compute his fees for filing this paper, which amounts to a certificate of increase of capital stock? Section 165, Revised Codes, provides: "The Secretary of State, for services performed in his office, must charge and collect the following fees: * * * (4) For recording and filing each certificate of incorporation and each certificate of increase of capital stock, the following amounts shall be charged." Then follows a schedule of fees graduated according to the amount involved. By section 4413 these provisions are made applicable to foreign corporations doing business in this state. If this paper, then, discloses that the capital stock of the United Missouri River Power Company was increased to the extent of \$3,750,000, the Secretary of State was entitled to receive \$580 in fees; if, however, the increase was only \$1,750,000, then he was entitled to only \$380. This is conceded.

Upon entering this state to transact business each of the two corporations mentioned above paid the full legal fees for filing its articles of incorporation, the United Missouri River Power Company upon its capital stock of \$10,250,000, and the Capital City Power Company upon its capital stock of \$2,000,000; and it is now insisted by counsel for appellant that, since the fees have been paid upon this \$2,000,000, and this amount of capital stock has been merely absorbed by the other company, an additional fee imposed upon this same \$2,000,000 should not be exacted. In other words, the contention is that the legislature never intended that a company should pay more than one filing fee upon the same capital stock. Whatever may be said of this argument, it is manifest at once that the legislature never contemplated any such conditions as have arisen in this case. We have a very elaborate system of laws governing the organization and management of domestic corporations and prescribing the conditions upon which foreign corporations may do business in this state. But there is not any provision whatever authorizing two or more domestic corporations to consolidate or one to be merged in the other, except section 3896, Revised

Codes (substantially duplicated by section 4408), which relates to certain mining corporations exclusively, and House Bill 160, approved March 6, 1909 (Laws 1909, p. 146), authorizing one corporation to acquire shares of stock in another corporation; and neither of these statutes has any reference to the subject before us. Under these circumstances, of course, the legislature did not make any provision for filing the articles of consolidated corporations, as such, and neither did it prescribe the fees for filing the certificate of consolidation or merger of foreign corporations which may have thus united under the laws of the state of their creation.

When the certificate was presented to the Secretary of State, we think he did not have any authority to inquire by what means or for what purpose the capital stock of the United Missouri River Power Company had been augmented. The only legitimate inquiry he could make was: To what extent does this certificate indicate that the capital stock of the corporation has been increased? The records in his office and this certificate itself show that prior to January 26th the capital stock of the United Missouri River Power Company was \$10,250,000, and this certificate discloses that after that date the capital stock was \$14,000,000, an increase of \$3,750,000. Under the mandate of the statute, the secretary charged and collected the fees imposed upon this amount of increase, and the fact that of this amount \$2,000,000 represented the capital stock of the Capital City Power Company, for which the capital stock of the United Missouri River Power Company had been substituted, was not a matter with which he could concern himself. The argument which counsel for appellant makes might be convincing to the legislative assembly; but, under the law as it now stands, we think the Secretary of State is not warranted in looking beyond the ultimate fact of increase as disclosed by the certificate which is tendered for filing.

Counsel have not, and neither have we, found any decided cases bearing directly upon the subject. We have proceeded upon the theory, which we deem correct, that in matters of this

character the Secretary of State is controlled altogether by statute, and for every act done by him the authority for his act must be found written in the statute.

We think the judgment of the district court is correct, and it is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE BANK OF MOORE, APPELLANT, v. FORSYTH, RESPONDENT.

(No. 2,821.)

(Submitted April 9, 1910. Decided April 30, 1910.)

[108 Pac. 914.]

Banks and Banking—Authority of Cashier—Promissory Notes—Consideration—Principal and Agent—Knowledge of Agent, When not Imputable to Principal.

Promissory Notes—Want of Consideration—Defense.

1. It is a valid defense to the enforcement of a promissory note against the maker by the party to whom it was delivered, that the note was without consideration and was delivered on condition that the maker should not be held liable thereon.

Same—Banks and Banking—Authority of Cashier.

2. Defendant was induced by the cashier of a bank to sign and deliver a note to the bank, in order that the cashier might substitute it for notes of his own held by the bank, under the assurance of the cashier that he would not be liable upon it, and would never be asked to pay it. The cashier turned the note in to the bank, withdrew his own, and received the excess of the note over his indebtedness to the bank in money. There was no evidence that the officers or directors of the bank had authorized the cashier to make any such arrangement with defendant, who never before had any dealings of like kind with the cashier. *Held*, that the latter had no authority, by virtue of his office, to make such an arrangement; that defendant was chargeable with notice that the arrangement was not authorized, and hence that defendant acted upon the cashier's statement at his peril.

Same—Consideration—Sufficiency.

3. Defendant's note, given to be substituted for the cashier's notes referred in paragraph 2 above, was supported by a sufficient consideration, since the cashier's notes were withdrawn from the bank's assets and the excess of the amount of defendant's note over the cashier's obligations was paid by the bank to the latter.

Same—Consideration on—Banks and Banking—Fraud.

4. Defendant, who knew, or should have known, that the cashier, in requesting him to sign the note so as to be able to substitute it for his own obligations, because it "would not look well to the bank examiner" to find his paper in the bank, was engaged in perpetrating a fraud upon plaintiff, could not escape liability on the alleged ground that the note had been given without consideration.

Same—Banks and Banking—Knowledge of Cashier, When not Imputable to Bank.

5. The knowledge possessed by plaintiff's cashier that defendant received nothing for the note executed by him could not be imputed to the bank, since, while the knowledge of an agent is generally imputable to his principal, the rule does not apply where the conduct of the former is such as raises a clear presumption that he would not communicate the fact in dispute, as where, by imparting knowledge to the principal, the consummation of a fraud in which the agent was engaged would be prevented.

Appeal from District Court, Fergus County; J. Miller Smith, Judge of the First Judicial District, presiding.

ACTION by the State Bank of Moore against John R. Forsyth. Judgment for defendant, and plaintiff appeals from it and an order denying it a new trial. Reversed and remanded, with directions to enter judgment in favor of plaintiff.

In behalf of Appellant, there was a brief and oral argument by *Mr. O. W. Belden*.

A contemporaneous parol agreement between the parties to a note that it was not to be enforced as between the parties constitutes no defense to the note. (*Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977.) Parol evidence of an oral agreement alleged to have been made at the time of the making of a promissory note cannot be admitted to vary, qualify, contradict or add to, or subtract from, the absolute terms of the written contract. (*Forsyth v. Kimball*, 91 U. S. 291, 23 L. Ed. 352; *First National Bank v. Tisdale*, 18 Hun, 151; *True v. Shepard*, 51 N. H. 501; *Mitchel v. Noell*, 39 Ind. 399; *Armstrong v. Scott*, 36 Fed. 63; *Innerarity v. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *School District v. De Weese*, 100 Fed. 705; *Jones v. First Nat. Bank of Lincoln*, 3 Neb. (Unof.) 73, 90 N. W. 912; *Peterson v. Fer-*

baché, 4 Neb. (Unof.) 249, 93 N. W. 1011; *Earle v. Enos*, 130 Fed. 467.) Admitting for the purpose of argument that Thurston did enter into the agreement with defendant as defendant testified, it cannot be contended that in so doing he was acting for appellant in the matter. The transaction was antagonistic to the welfare of the bank, and shows collusion and fraud, of which the appellant was innocent, between Thurston, the cashier, and respondent. Under such circumstances, the act of the cashier is not the act of the bank. (*State Sav. Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879; *Third Nat. Bank v. Harrison*, 10 Fed. 243, 3 McCrary, 316; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Hummell v. Bank*, 75 Iowa, 689, 37 N. W. 954.)

Admitting defendant's statement to be true that appellant paid the proceeds of the note to Thurston, its cashier, then appellant parted with value for the instrument. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time. (Revised Codes, sec. 5874.) Even if respondent did not receive the consideration, he was still an accommodation maker and lent his name to Thurston, the cashier. By so doing, he became liable on the note to appellant who parted with value for the note. (Revised Codes, sec. 5877; *Pauly v. O'Brien*, 69 Fed. 460; *Earle v. Enos*, 130 Fed. 467.)

A bank is not chargeable with notice of the fraudulent act of its employee outside the scope of his authority, and in furtherance of his own personal designs, solely because he is an employee. (*Jones v. First Nat. Bank of Lincoln*, 3 Neb. (Unof.) 73, 90 N. W. 913; *School District v. De Weese*, 100 Fed. 709; *Innerarity v. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *State Savings Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879; *Earle v. Enos*, 130 Fed. 467; *Pauly v. O'Brien*, 69 Fed. 460.) A principal is not bound by the act of his agent where agent has an adverse interest. (Mechem on Agency, sec. 713.)

The consideration in this case actually passed from the plaintiff bank, and having paid the consideration, defendant's plea of want of consideration, so far as he was concerned, is no defense to the action. (*Pauly v. O'Brien*, *Earle v. Enos*, *supra*.)

Messrs. Blackford & Blackford submitted a brief in behalf of Respondent. *Mr. W. M. Blackford* argued the cause orally.

Evidence of the oral agreement of plaintiff's cashier with defendant made at the time of the delivery of the note sued on, that defendant would not be held liable on it and that the bank would not ask him to pay it, and all the circumstances under which the note was made and delivered, and that it was made and delivered at the request and for the accommodation of the bank, was proper and competent. The answer expressly set up the oral agreement as a defense to plaintiff's recovery on the note. That this is a good defense to plaintiff's action is supported by the soundest reason in numerous authorities. (*Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Benton v. Martin*, 52 N. Y. 570; *Garfield Nat. Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864; *Persons v. Hawkins*, 41 App. Div. 171, 58 N. Y. Supp. 831; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Harris v. Brooks, Jr.*, 21 Pick. 195, 32 Am. Dec. 254; *Grierson v. Mason*, 60 N. Y. 394; *Juillard v. Chaffee*, 92 N. Y. 529; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210.) As between the maker and payee of a promissory note, the defense of want of consideration may be interposed (*Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74), and may be shown by parol. (*Rossiter v. Loeber*, 18 Mont. 373, 45 Pac. 560; *Hannan v. Hannan*, 123 Mass. 441, 25 Am. Rep. 121; *Benton v. Martin*, 52 N. Y. 570, 575; *Juillard v. Chaffee*, 92 N. Y. 529; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; *Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375; *Devlin v. Quigg*, 44 Minn. 534, 20 Am. St. Rep. 592, 47 N. W. 258, 10 L. R. A.

665; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 219.) Nor do the words "value received" in a promissory note preclude an inquiry into the consideration. (*Simpson Centenary College v. Tuttle, supra.*)

Where a note is to be merely a matter of form to enable a trust company to make the loan without criticism, and the officer in charge assures the party making the note that he will incur no personal liability by signing it, he may successfully interpose such facts as a defense to the enforcement of the note against him by the payee, on the ground that the note was without consideration and was delivered upon the condition that the maker would not be liable thereon. (*Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018.)

Upon the principle that where a party deals with a corporation in good faith, and is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, the corporation is bound by the contract, if not *ultra vires*, although such defect or irregularity in fact exists. (See *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 644, 19 L. Ed. 1008; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, 52; *Cox v. Robinson*, 82 Fed. 277, 27 C. C. A. 120; *Simmons v. Thompson*, 29 App. Div. 559, 562, 51 N. Y. Supp. 1018; *Nicholson v. Randall Banking Co.*, 130 Cal. 533, 62 Pac. 930; *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 89 Fed. 439, 95 Fed. 23, 36 C. C. A. 633; *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 907, 66 N. W. 115; *Bell v. Hanover Nat. Bank*, 57 Fed. 821; *Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695; *Fisher v. Simons*, 64 Fed. 311, 12 C. C. A. 125; *Tourtelot v. Whithed*, 9 N. D. 407, 84 N. W. 8; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. L. 513, 7 Atl. 318; *Blake v. Domestic Mfg. Co.* (N. J.), 38 Atl. 241.)

The defendant's answer having squarely presented the issue of want of consideration for the note sued on, and evidence having been given on the part of the defendant in support of that defense, the trial court rightly instructed the jury that the

burden of proof was on the plaintiff to show the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, plaintiff could not recover. (*Ginn v. Dolan* (Ohio), 90 N. E. 141; *Kenny v. Walker*, 29 Or. 41, 44 Pac. 501; *Best v. Rocky Mountain Nat. Bank*, 37 Colo. 149, 85 Pac. 1125, 7 L. R. A., n. s., 1035; *Owens v. Snell, Heitshu & Woodard Co.*, 29 Or. 483, 44 Pac. 827; *Nickerson v. Ruger*, 76 N. Y. 279; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59, 31 N. W. 140; *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726; *Search v. Miller*, 9 Neb. 26, 1 N. W. 975; *Langley v. Wadsworth*, 99 N. Y. 61, 1 N. E. 106.)

MR. JUSTICE SMITH delivered the opinion of the court.

The plaintiff began this action in the district court of Fergus county to recover judgment against the defendant on a certain promissory note for \$1,550, dated June 20, 1907, due four months after date, with interest after maturity at the rate of ten per cent per annum. The defendant answered, admitting the corporate capacity of the plaintiff, and that the latter was the owner and holder of the note. He also admitted the making and delivery of the note, but denied that it was given for a valuable consideration, or for any consideration whatever. By way of affirmative defense he alleged that the note was made at the express instance and request of the plaintiff, without consideration, and for plaintiff's accommodation. He further pleaded in his answer that at the time the note was made and delivered, it was agreed between him and the plaintiff that he should not be required to pay the note, and that he should not be in any manner liable thereon. As a further affirmative defense he alleged that the note was procured by plaintiff through false and fraudulent representations on the part of plaintiff's cashier, with intent to deceive and defraud him. This latter defense was abandoned at the trial. The plaintiff by replication denied the new matter set forth in the answer. The cause was tried to the district court of Fergus county sitting with a jury. A verdict was returned in favor of the defendant, and

judgment was entered thereon. From that judgment and an order denying a new trial the plaintiff has appealed to this court.

The note purported to have been made for value received. After the same was introduced in evidence the plaintiff rested. Thereupon the defendant testified, in part, as follows: "This note was made in the bank at Moore, at C. W. Thurston's bank. Thurston was at that time cashier of the bank. Q. How came you to make this note?" This question was objected to on the ground that any oral contemporaneous agreement would tend to vary and change the tenor of the note, and because it had not been shown that Thurston was acting within the scope of his authority as cashier. The objection was overruled, and the witness continued: "Well, Mr. Thurston asked me to make a note, sign a note, for \$1,500, and I told him that I did not want to sign the note, and he asked me why, and I told him I could not pay the note if I was called upon to do so. He said that the bank would not hold me responsible. He said that his paper would not—that the bank would not want his paper in there, and that it would not look well to the bank examiner, and I told him that was the condition under which I would sign it; that the bank would not hold me liable or responsible on the note, and he said the bank would never ask me to pay it, and that he would look after it, and that I never need bother about it. And I signed the note, and he took it and turned it in to the teller. I did not receive any of the proceeds of the note. I was not called upon to pay the note at the time of maturity. It must have been a month after the note matured before anything was said about it. Mr. Thurston was not still cashier of the bank. Mr. Hedrick, the cashier that went in afterward, called upon me to pay the note. It is supposed Thurston got the proceeds of the note. Of course, at that time I didn't know whether he did or not. What makes me think he did is because it has been shown that he did to my mind. It is through matters subsequently learned that I base my answer that Thurston got the proceeds of the note. Of my own knowledge I

don't know anything about the matter. I had no dealings of that sort with Thurston before. He and I were in the real estate business together at that time. We were partners at that time in the Judith Basin Realty Company. At that time I was occupying an office in the State Bank of Moore; I had a back room. The Judith Basin Realty Company did not share any of the proceeds of that note. I did most of the work of the realty company."

John N. Phillips, a former bookkeeper and teller of the bank, testified: "Mr. Thurston was cashier of the bank until September 3, 1907. When this note went into the bank it took up three of Mr. Thurston's cash items, aggregating \$480.48, which had been running some little time; also two notes carried in the bank by Mr. Thurston, aggregating \$423.07. These notes were given to the bank by Thurston, and the proceeds of the Forsyth note, or part of it, took up those two notes. Four drafts issued by the bank on June 20, 1907, through Mr. Thurston, aggregating \$51.40, were also paid by Thurston from the proceeds of the note. Part of the other proceeds of this note went to the credit of Mr. Thurston's account, and he took cash for some of it. Under date of June 20, 1907, Thurston's account shows a credit of \$400. That \$400 came from the proceeds of the Forsyth note. The balance was taken in cash. While I was employed in the bank, Mr. Thurston had charge of making the loans; that was principally his work. He made all kinds of loans. He made loans as large as the capital of the bank would stand. I don't think he consulted any of the directors of the bank. I know positively that on certain loans he did not consult with other directors of the bank. As long as he had charge of the bank he pursued that line of conduct, or making loans of that character and size without consulting the other directors or officers of the bank. He had charge of the promissory notes taken by the bank. In making payments of notes no one was consulted but the cashier. I didn't consult anyone except Thurston. If he was away I used my own judgment in the matters. The bank had a manager. Mr.

Thurston was the manager. The directors of the bank held meetings once a year, on the 1st of January. They never held any meetings after that, until September of the year 1907. Mr. Hauck, the president of the bank, was about the bank there quite often, probably twice a week, or once. He usually came into the bank and talked a little while and went out again. Mr. Thurston issued the drafts of the bank exclusively. He made the loans if he was there. If he was away, I made them in his place. Mr. Thurston used his own judgment in making loans. There was no one there for him to consult with. It was the custom to make loans immediately upon application. A great many promissory notes were taken without security. Notes were usually taken by Thurston without consulting anyone else. The president of the bank resided ten miles from Moore, and the vice-president resided fifty miles away. Thurston was in charge of the bank as manager on June 20, 1907. This note came to the bank in the usual course of business. Thurston brought it to me. The rest of the banking force were working under him. He overlooked their work. He had charge of the moneys."

At the close of defendant's case the plaintiff moved for a directed verdict in its favor. The motion was overruled. Thereupon John C. Hauck, the president of the bank, was called as a witness for the plaintiff. He said: "I was supervisor of the affairs of the bank during the year 1907. Every once in a while we would go over the accounts and check them all up, I and Mr. Warr, the cashier of the Bank of Fergus County. We did that for about four months after the bank was started, and then we done it off and on ever since up to the time Thurston left. I went through everything that was in the bank several times in the two years, about five or six times I should judge. That was when Thurston had charge of the bank. I never, as president, authorized Thurston to make any collateral agreements that the paper of the bank should not be, or was not to be, collected. I don't think we directors had any meetings in the spring and summer of 1907."

At the close of all the testimony, the plaintiff's counsel requested the court to charge the jury that, if the State Bank of Moore paid any consideration for the note, their verdict must be for the plaintiff, and also that the alleged oral agreement of Thurston that the defendant would not be called upon to pay the note was no defense to the action. The court refused the requests. Over appropriate objection by the plaintiff, the court advised the jury that, as between the maker and payee of a promissory note, oral evidence touching the consideration thereof could be considered by them, and that if they found that the defendant received no consideration, and that the note was made for the accommodation of the plaintiff, their verdict should be for the defendant. The jury was also instructed, without objection, that: "If Thurston owed to or borrowed from the plaintiff the amount of the note sued upon, and if, at the request of Thurston, the defendant gave to the plaintiff the note sued upon in satisfaction of such indebtedness of Thurston to the plaintiff, and the plaintiff accepted the note as such satisfaction, then the note was given upon sufficient consideration, and the plaintiff is entitled to recover the amount due on the note."

The court also gave to the jury instruction No. 3, as follows: "The court instructs the jury that the burden of proof was on the plaintiff to show that the note was given upon a valuable consideration, and that, if that was doubtful upon the whole evidence, plaintiff could not recover; that the admission by the defendant of the execution of the note and its production in evidence made a *prima facie* case for the plaintiff upon which the jury might find a verdict for plaintiff, unless the defendant introduced evidence which showed that it was not given for a valuable consideration, or evidence to render it doubtful in the minds of the jury whether it was given on a valuable consideration, and that if not so given, or if it was doubtful whether it was given for a valuable consideration, the plaintiff could not recover." Plaintiff objected to this instruction, for the reason that it placed the burden of proving the considera-

tion for the note upon plaintiff, whereas the burden of showing a failure of consideration was upon defendant; also because the instruction is in conflict with instruction No. 9, which reads as follows:

“(9) You are instructed that the note sued upon in this case imports a consideration, and the burden of showing a want of consideration sufficient to support a written instrument lies with the party seeking to invalidate it.”

Instruction No. 7 reads as follows: “The court instructs the jury that, if you find from the evidence that the defendant signed the note sued upon in this case as an accommodation maker for the plaintiff, and delivered the note to the plaintiff, or one of its officers for the bank, the defendant cannot be held liable thereon, no matter how the bank may have dealt with the note, so long as it retained ownership and control thereof, and, even though you find that the bank, after the note was delivered to it, gave Thurston the benefit of the whole or a part of it, this fact would not render defendant liable on the note.” This instruction was also objected to for several reasons; among others, that it conflicts with instructions 8, 10, and 11, given by the court. These latter instructions read as follows:

“No. 8. If you find from the evidence that the note in question was made, executed, and delivered to the State Bank of Moore by John Forsyth, for the accommodation of Mr. Thurston, and that Thurston received the benefits therefrom, then you must find for the plaintiff.”

“No. 10. The plaintiff in this action is a corporation, and you are instructed that a corporation is bound by the acts of its officers or agents only so far as they act within the scope of their authority. In this action, the burden is upon the defendant to prove by a preponderance of the evidence that in making the oral agreement, if you believe that such oral agreement was made, Thurston, the cashier of the plaintiff, was acting within the scope of his authority as such cashier, or that such agreement was subsequently ratified by the plaintiff in the action. If the defendant has failed to prove these allegations by

a preponderance of the testimony, your verdict should be for the plaintiff.

“No. 11. In this action the defendant claims, among other things, that the note sued upon was made for the accommodation of the plaintiff. You are instructed that an accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser without receiving any value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value notwithstanding such holder, at the time of taking an instrument, knew him to be only an accommodation party.”

We think the foregoing extracts from the instructions fairly illustrate the theory upon which the case was tried, and that the motions and exceptions of counsel for appellant are sufficient to raise the vital questions argued in this court. We shall not analyze the instructions, but will content ourselves with the statement that, assuming that they correctly state the law, the jury failed to follow them. The testimony, however, is practically uncontradicted. There is no conflict in essentials, and, in our judgment, but one inference may be drawn from it. Therefore the cause should not have been submitted to the jury. The court should have directed a verdict for the plaintiff.

1. The first question arising is whether the defense of want of consideration in the note, pleaded and attempted to be interposed by the defendant, was a valid one.

In the case of *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32, the court of appeals, after a review of the New York cases on the subject, held that it was a valid defense to the enforcement of a promissory note against the maker, by the party to whom it was delivered, that the note was without consideration, and was delivered upon the condition that the maker should not be held liable thereon. To the same effect are the rulings of the courts in *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; *Benton v. Martin*, 52 N. Y. 570; *Garfield National Bank v. Colwell*, 57 Hun, 169, 10 N. Y. Supp. 864; *Simmons v.*

Thompson, 29 App. Div. 559, 51 N. Y. Supp. 1018; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; *Juillard v. Chaffee*, 92 N. Y. 529; *Schindler v. Muhlheiser*, 45 Conn. 153.

In the case of *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977, cited by appellant in opposition to the principle laid down in the foregoing cases, it appeared that there was a consideration for the note in question, and the court said: "The law will not permit the maker of a note, where there is a consideration, to show an oral agreement that he was not to be liable at all on the note." Appellant also cites the case of *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321, but in that case the court said: "The note fixes the obligation of the appellant to pay, and his pleadings leave open to him only the defense that it was executed without consideration. Evidence tending to support that defense is admissible." The court then proceeded to show that there was a valid consideration for the note.

The case of *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232, is also called to our attention. In that case it was held that evidence of a contemporaneous oral agreement between the parties to a note that it was not to be enforced as between them, is inadmissible. But the opinion of the court, by Mr. Justice Taylor, discloses the fact that it was finally determined that the note in suit was given upon sufficient consideration.

We are of opinion that, in view of the authorities, and in principle, the rule laid down by the New York court of appeals, in *Higgins v. Ridgway*, *supra*, is founded in sound reason, and that the court below properly followed the same.

2. Was the bank bound by the representations of its cashier that defendant should not be called upon to pay the note?

The supreme court of the United States, in *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 482, 28 L. Ed. 49, held that, although a cashier of a bank ordinarily has no power to bind the bank except in the discharge of his customary duties, and although the ordinary business of a bank does not comprehend a contract made by a cashier, without delegation of power from the board of directors, involving the payment of money not loaned

by the bank in the customary way, nevertheless it may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been suffered by the directors, without interference or inquiry, to conduct the affairs of the bank; and when, during a series of years, or in numerous business transactions, he has been permitted, in his official capacity and without objection, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. The matter involved was a legitimate transaction, from which the bank derived an advantage. It will be observed that the principle of estoppel *in pais* was thus invoked against the bank.

Again, the supreme court of the United States in *West St. Louis Savings Bank v. Shawnee County Bank*, 95 U. S. 557, 25 L. Ed. 490, said: "Ordinarily the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking; * * * but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power."

Mr. Thompson in his work on Corporations (volume 2, second edition, section 1532) says: "The principal limitation upon the powers of a cashier is that his acts must be within his ordinary duties. It cannot be assumed that he is authorized to do every act within the powers of the bank. His implied authority is limited to acts done in the usual and ordinary course of business, and cannot be extended to cover unusual and extraordinary transactions. For the transaction of such business, special authority must be conferred upon him by the directors."

In volume 1 of Morse on Banks and Banking (fourth edition, Parsons), section 167, we find this statement: "It can never be pretended that he [the cashier] has any incidental powers to bind the bank by declarations or admissions which are made beyond the scope of his duties. Thus, his statement or promise given to a person who is about to put his name as indorser upon a note which the bank has agreed to discount, to the effect that such person will not be held liable or shall not be looked to by the bank, is altogether inoperative and void as an undertaking of the bank." (See, also, 1 Bolles' Modern Law of Banking, p. 361.)

In the case of *Bank of the United States v. Dunn*, 6 Pet. 51, 8 L. Ed. 316, the defendant offered to prove that the cashier and president of the bank gave him to understand that if he indorsed the note in suit, he would incur no risk or responsibility. The court said: "The most decisive objection to the evidence is that the agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank, except in the discharge of their ordinary duties."

In *Bank of the Metropolis v. Jones*, 8 Pet. 12, the court said: "It is unnecessary to add in this case, as was stated by the court in the case of *Dunn*, that the officers of the bank had no authority, as agents of the bank, to bind it by the assurances which they gave." In the *Jones Case* it appeared that the president of the plaintiff bank had assured the indorser, through the maker, that he would incur no responsibility on the note on account of the fact that certain property, which could be subjected to its payment, was very valuable.

In the case of *Thompson, as Receiver, v. McKee*, 5 Dak. 172, 37 N. W. 367, the facts were these: McKee went to the First National Bank of Sioux Falls to identify one Wolf, and at the request of the cashier wrote his name on the back of a draft, the cashier assuring him that he should not be liable on it, his name being wanted merely to show who identified Wolf. Mc-

Kee afterward gave his note to the bank for the amount of the draft it had cashed, with an understanding with the cashier that his liability on the note should not be greater than it was on the draft, and he subsequently renewed this note, with a similar understanding with the president and cashier. The court held that the facts constituted no defense, for the reason that the president and cashier had no authority to make any such contract. Mr. Justice Spencer, speaking for the court, said: "It has been repeatedly held by the highest judicial tribunals that officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers or indorsers, and on the credit of which the bank has parted with its funds."

In the case of *Claflin v. Farmers' & Citizens' Bank*, 25 N. Y. 293, it was held that the general authority of the president of a bank to certify checks drawn upon it does not extend to checks drawn by himself.

The supreme judicial court of Massachusetts, in *Dedham Institution for Savings v. Slack*, 6 Cush. (Mass.) 408, held that the treasurer of an incorporated institution for savings has no authority, as such, and without being specially authorized thereto, to execute a release in the name of the corporation.

In *Gallery v. Bank*, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193, it was shown that one Irwin was president of the bank and also of a railway company. With other directors of the railway company he made a note to the bank. Evidence was introduced tending to prove that the note was not to be paid by the makers thereof, but only from the assets or funds of the railroad company. It was claimed that Irwin, as president of the bank, consented to an arrangement by which the debt was assumed by a third person and the makers released. The court said: "Even had he [Irwin] assumed to act for and represent the bank, being liable as maker and indorser, he could not consent to his own release and that of his comakers and bind the

bank thereby. * * * That he could not act in such a double and antagonistic capacity is well settled in this state." (See, also, *Payne v. Commercial Bank*, 6 Smedes & M. (Miss.) 24; *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. Rep. 479, 55 N. W. 631, 20 L. R. A. 780; *Bank v. Reed*, 1 Watts & S. (Pa.) 101; *Hodge's Exr. v. First Nat. Bank*, 22 Gratt. (Va.) 51; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 68; *Davies Co. Savings Assn. v. Sailor*, 63 Mo. 24; *Sandy River Bank v. Merchants' etc. Bank*, 1 Biss. 146, Fed. Cas. No. 12,309; *Ellis v. First Nat. Bank*, 22 R. I. 565, 48 Atl. 936; *German Savings Bank v. Des Moines National Bank*, 122 Iowa, 737, 98 N. W. 606; *Mendel v. Boyd*, 71 Neb. 657, 99 N. W. 493.)

The testimony shows that the transaction in controversy was an isolated one. The defendant testified that he had previously had no dealings of the kind with Thurston. No question of estoppel is involved. Hauck testified that he, as president, had never authorized the cashier to make the arrangement testified to by the defendant, and there is no evidence that the board of directors did so. We conclude, therefore, that the promise of Thurston was, on its face, beyond the scope of his authority, and that the defendant was chargeable with notice thereof. We hold that the cashier of a bank, by virtue of his office, has no authority to make such an arrangement as that testified to by the defendant, and that whoever accepts such an agreement and acts upon it does so at his peril.

3. But it is contended that the note was in fact given without consideration. If so, this was an available defense against the payee, regardless of whether the cashier had authority to promise that defendant should not be called upon to pay.

The testimony shows conclusively that the plaintiff in fact parted with full consideration for the note, and, to our minds, the evidence of the defendant himself proves that a valid consideration passed, and that he was aware of the fact that certain assets of the bank were to be withdrawn and his note substituted in place thereof at the time he executed and delivered the same. How otherwise can his statement that "the

bank would not want to have Thurston's paper in there'' be explained? The only reasonable construction to be placed upon his testimony is that he knew that Thurston was personally desirous of withdrawing his paper. But it is immaterial what phraseology was employed. The very fact that Thurston proposed to withdraw his own paper was notice to the defendant that he was acting for himself.

And there are other reasons why the judgment cannot stand. The whole transaction shows on its face that Thurston was in fact acting for himself, and not for the bank, and that the defendant either knew the fact, or should have known it. Thurston was engaged in a palpable attempt to defraud the bank of which he was cashier, and the defendant by his acts made it possible for him to consummate the fraud. In the case of *Pauly v. O'Brien* (C. C.), 69 Fed. 460, Judge Ross said: "It is said for the defendant that the note sued on was without consideration. Not so, according to the agreed statement of facts, for it is there stated that it was executed in place of and to take up the note of Naylor, then represented by the bank officers to be past due and to be secured by collaterals which were believed to be ample to pay it, and which they represented the bank wanted to get 'out of the past-due notes,' and which together with the collaterals were to stand as collateral to the note executed by the defendant upon the execution of which the Naylor note was entered as paid on the books of the bank, and the defendant's note was entered thereon 'as a discount for its face.' It thus appeared that the defendant executed his first note, subsequently renewing it from time to time, and ultimately by the note in suit, for the purpose of having it take the place of the Naylor note, which, together with the collaterals, 'were to be collateral to the note' given by him. If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same; for, when parties employ legal instruments of an oblig-

atory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice-president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive, and therefore fraudulent, showing of assets?"

In the case of *Allen v. First Nat. Bank*, 127 Pa. 51, 14 Am. St. Rep. 829, 17 Atl. 886, the facts were these: The bank brought an action to recover the sum of \$5,000 alleged to be due on a promissory note. The defendant offered to prove that Beecher, the cashier of the bank, came to him at the postoffice and said that the bank was carrying for his firm of Beecher & Copeland a quantity of oil certificates, in excess of what they were permitted to carry for one firm under the laws of the United States, and that the bank desired to have the oil carried in the name of other parties, so as to make an appearance of compliance with the law, and for that purpose he asked the defendant to become the maker of a note for \$5,000, to be secured by 5,000 barrels of oil that the bank was carrying for Beecher & Copeland; and, in compliance with this request, Allen executed the note without other consideration, and with the express agreement that he should not be held liable thereon. The trial court directed a verdict for the plaintiff bank. On appeal the su-

preme court said: "Assuming all the facts covered by the offers to have been proved, they would not have amounted to a defense as against the bank. The whole confusion in the case grows out of the fact that Mr. Beecher was at the same time a member of the firm of Beecher & Copeland and cashier of the bank. The effort here is to make the bank responsible, not merely for matters done in the scope of his duties as cashier, or by authority of the bank, but also for his acts and declarations done or made in the pursuit of his private business. His interview with the defendant at the postoffice can only be taken as an effort on his part to procure accommodation paper to the amount of \$5,000 to take up a like amount of his firm's paper at the bank. In some way his firm had obtained a larger line of discount at the bank than is permitted by the general banking law; the bank examiner was expected soon, and it became necessary for defendant's firm to retire some of its paper. . It was equally necessary, perhaps, for the bank; and (the defendant as) its cashier must have been fully aware of the importance of getting the account of his own firm in proper condition. He succeeded in procuring from the defendant his note for \$5,000 to replace a like amount of his firm's paper, with an assurance that the defendant should never be called upon to pay it."

The case of *Simmons v. Thompson*, 29 App. Div. 559, 51 N. Y. Supp. 1018, is called to our attention by the learned counsel for the respondent. In that case, however, the court held that the vice-president of the Loan and Trust Company who induced the defendant to make the note in suit, by representations that he should not be held liable upon it, was apparently clothed with authority in the premises; the facts show that he was actually engaged in carrying forward a transaction which was beneficial to his principal, and also that the corporation had ratified his acts. The question of consideration as arising from the detriment to the trust company which advanced money on the note is not mentioned in the majority opinion, but is quite clearly shown by the dissenting opinion of Mr. Justice Ingra-

ham. Aside from this, we do not regard the doctrine laid down by the court in that case as a healthy one. It loses sight of the rights of innocent stockholders and depositors in banks altogether, and relieves a party who, by affirmative action, has brought about the unfortunate condition in which he finds himself.

But it is contended that the knowledge possessed by Thurston is to be imputed to the bank, and therefore the latter had notice that Forsyth received nothing for the note. The correct rule on this subject is, we think, laid down in *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282, as follows: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. * * * A bank * * * can only act through agents, and it is generally true that, if a director who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, and it is affected by his knowledge. * * * But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumes conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds, by imputing to the bank a knowledge those properly representing it could not have possessed." (See, also, *State Savings Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879.)

In the case at bar we have only to consider the effect of the testimony to determine that the defendant is not in a position to dispute his liability on this note. It would be a most dangerous holding if we should decide, upon the facts disclosed by

the record, that he could do so. We find no evidence that he had any idea or purpose of accommodating the bank. It does not appear that Thurston was present at the trial. It does appear, however, that he used the funds of the bank from time to time, that he resigned his position there, and that it was necessary to prove his handwriting by another person. The whole record seems to show that his management of the bank was at least open to criticism, and it is not a violent conclusion, perhaps, that he was not available as a witness. The defendant was his partner at the time the note was given, and had his office in the rear of the bank. Upon being requested to sign a note for \$1,500, on account of the fact that his (Thurston's) paper in the bank would not look well, he did so without inquiry as to the amount of such paper which it was proposed to take up, and without asking what disposition was to be made of the balance, if any, of the proceeds of the note. He thus made it possible for Thurston, not only to take up two of his own notes for \$200 each, which were assets of the bank, but to also draw out a large amount in cash. It seems to us that the request of Thurston bore on its face conclusive evidence that some fraud was projected. The defendant knew that his note was to pass through the regular channels of the bank. He saw Thurston hand it to the teller. It is a penal offense in this state to knowingly make false entries in the books of a bank, or to knowingly subscribe or exhibit false papers with intent to deceive the state bank examiner. (Revised Codes, sec. 4001.) The defendant was chargeable with knowledge of this statute, and with notice that it was Thurston's purpose to violate it. How can it be possible for a man of ordinary intelligence to suppose that a request for an accommodation note for a large amount, made by a cashier, is intended to be for the benefit of the bank? Notes are ordinarily given to a bank for the purpose of borrowing money therefrom. We can conceive of no circumstances under which a bank can require an accommodation note on its own account for any legitimate purpose. It seems to us that the mere request carries notice that the purpose for which such

paper is intended to be used is not a lawful one. What legitimate end could possibly be served by carrying in a bank commercial paper which was not to be paid under any circumstances? Obviously none. The only possible design would be to deceive some one, either the stockholders, the depositors, or the bank examiner, who acts for them in the name of the state. It is only an innocent party who may take advantage of such a defense as that attempted to be interposed in this case, when other innocent parties have suffered. The defendant cannot claim to occupy such position. The stockholders in the plaintiff bank have, through his connivance, suffered a loss of \$1,500, and a case might arise, as it often does, where the loss would fall upon the still more innocent depositors. We cannot give our assent to the proposition, whatever may have been the holdings of other courts upon the subject, that a party who has been guilty of such gross negligence as has the defendant in this case can escape liability on account of technical rules of law, and compel other persons to stand the loss caused by his total lack of care. The presumption that Thurston informed the bank, through its proper officers, of his fraudulent intention to withdraw its funds for his own personal use, through the medium of defendant's note, is fully removed by the reflection that, had he done so, his purpose would have been defeated.

The order and judgment appealed from are reversed, and the cause is remanded to the district court of Fergus county, with directions to enter judgment in favor of the plaintiff as prayed for.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

MOYSE, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
CO. ET AL., APPELLANTS.

(No. 2,823.)

(Submitted April 11, 1910. Decided May 2, 1910.)

[108 Pac. 1062.]

Railroads—Personal Injuries—Master and Servants—When Relationship Exists—Negligence—Pleading and Proof—Assumption of Risk—Measure of Damages—Annuity Tables—Instructions.

Personal Injuries — Railroads — Master and Servant — When Relationship Exists.

1. *Held*, in an action by a freight conductor against his employer, brought under section 5251, Revised Codes, making a railroad company liable for injuries sustained by an employee while employed in the discharge of his duties, through the negligence of any other employees, that plaintiff who, during the entire time when away from his home terminal, was subject to be called on duty and required to be within call, and who, though not required to do so under his contract of employment, was nevertheless expected to occupy the caboose of his train at night, was, when injured in a collision while asleep in the caboose standing on a sidetrack, in the discharge of his duties, and did not occupy the position of a mere licensee, even though his pay had, for the time being, ceased and would not begin again until called on duty.

Same—Negligence—Who Liable.

2. A caboose was placed on a yard track terminating at an excavation, toward which the track graded sharply. There was no device to prevent escaping cars from falling into the excavation. A yard crew while at work in making up a train placed cars on the track, but failed to properly secure them by brakes, and in escaping they ran against the caboose and caused it to fall into the excavation, injuring plaintiff—conductor. *Held*, that the defendant company and the yard foreman, whose duty it was to see that proper precautions were observed in the making up of trains, were liable for the injuries received.

Same—Duty of Master.

3. Under the circumstances set forth in paragraph 1, *supra*, the railroad company was bound to use ordinary care to provide the plaintiff a reasonably safe place in which to stay and to maintain that condition, and to that end to see that the yard crew took ordinary precautions not to allow cars to escape and collide with the caboose in which plaintiff was sleeping.

Same—Negligence—Pleading and Proof.

4. Although several acts of negligence are alleged in the complaint in a personal injury action, proof of all those alleged is not required; a recovery will be sustained upon proof of any one or more of them.

Same—Complaint—Pleading and Proof.

5. An allegation in the complaint that defendants negligently drove the railroad cars against the caboose in which plaintiff was sleeping was sustained by evidence tending to show that the cars escaped, the brakes having been insecurely set.

Same—Assumption of Risk—What Constitutes.

6. While plaintiff (a freight conductor), in sleeping in a caboose while waiting to be called on duty, assumed those risks of injury incident to the handling of cars by the yard crew engaged in the making up of his train which were known to him, he did not assume those which might arise from the negligence of said crew in failing to so securely set the brakes as to prevent them from escaping.

Same—Assumption of Risk.

7. The test to be applied in determining whether a servant assumed a risk is, not whether he exercised reasonable care to discover the danger, but whether the danger was known to him or plainly observable.

Same—Measure of Damages—Mortality Tables—Instructions.

8. Instructions on the measure of damages in a personal injury action, which told the jury that if plaintiff's capacity to earn money had been reduced by reason of his injuries, they should award such a sum as would purchase an annuity equal to the difference in the amount he could earn annually in his then condition, and the amount he could have earned if he had not been injured, having due regard to diminished earning capacity due to advancing age, etc., and that mortality and annuity tables were not to be considered as an absolute basis for their calculations, but should be used as a guide only so far as the facts before them corresponded to those from which the tables were computed, correctly stated the law.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by E. E. Moyse, against the Northern Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed as to two of the defendants, and reversed and remanded, with directions to dismiss the action as to the third defendant.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines, submitted a brief in behalf of Appellants. Mr. Wallace argued the cause orally.

The complaint is framed on the theory of liability to plaintiff, as one of its servants, for injuries received while in the active discharge of his duties in the course of his employment. We insist that, though it is admitted that plaintiff was in the general employ of the company as a conductor, the evidence will not justify any finding that at the time of, or just before, the accident he was engaged in the discharge of any duty of his employment, or in the course thereof; but, on the other hand, it is demonstrated that he had "registered in," been re-

lieved from duty, his pay had ceased, his caboose been turned over to the yard crew, he had been up town all the day before on his own affairs, and that he was not to resume the discharge of his duties, nor was his pay to recommence until he should be "called for duty," and he had not been so called. There is a wide distinction between "employment" and "a servant engaged in the discharge of his duties in the course of his employment." (See Dresser's Employers' Liability, p. 73; *Missouri Pac. Ry. v. Mackey*, 33 Kan. 298, 6 Pac. 291; *Atchison, T. & S. F. R. Co. v. United States*, 177 Fed. 114.) Whether the alleged servant is drawing pay, while not conclusive, is a test to determine whether the relationship exists at the time of the injury. (*Corbin v. American Mills Co.*, 27 Conn. 274, 71 Am. Dec. 63. See, also, on the general proposition above, the following authorities: *Orman v. Salvo*, 117 Fed. 233, 54 C. C. A. 265; *Ellsworth v. Metheny*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389; *Baird v. Pettit*, 70 Pa. 477, 484; *Wink v. Weiler*, 41 Ill. App. 336; *Neff & Co. v. Broom*, 70 Ga. 256; *Baltimore & Ohio R. Co. v. State*, 33 Md. 542; *State, Use of Abell, v. Western Maryland R. R. Co.*, 63 Md. 433; *Shadoan's Admr. v. Railway Co.*, 26 Ky. Law Rep. 828, 82 S. W. 567; *Wilson v. Railway Co.*, 130 Ky. 182, 113 S. W. 101.)

It is only in the event Moyse was engaged in the actual discharge of his duties that the railway company would have owed him the primary duty of using reasonable care to make his place of work safe, by protecting the end of the track, which duty the court charged was owing him in this case. And even if he were so then engaged, there was no primary duty owing by the railway to see to it that the switching by Doyle and his crew did not put the employees in peril. (*Pittsburgh Ry. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860; 26 Cyc. 1321; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 917; *Anderson v. Railroad Co.*, 28 Wash. 467, 68 Pac. 863; *Wilson v. Northern Pac. Ry. Co.*, 31 Wash. 67, 71 Pac. 713; *Richmond Co. v. Ford*, 94 Va. 627, 27 S. E. 511; *Lundberg v. Shevlin Co.*, 68 Minn. 135,

70 N. W. 1078; *Motey v. Pickle Marble Co.*, 74 Fed. 154, 20 C. C. A. 366; *The Kensington*, 91 Fed. 681; 2 Labatt on Master and Servant, pp. 1756, 1757, 1760-1762, and cases.)

Accountability for the acts of Whalen, Doyle and the switching crew could only be sustained under the fellow-servant statute. If the relationship of master and servant did not exist, as alleged in the complaint and as stated in the court's charge, at the time of the accident, then Moyse could not avail himself of the provisions of the fellow-servant statute (Rev. Codes, sec. 5251), or hold the company liable for the alleged negligent conduct of Doyle and Whalen or the switching crew. (*Kelly v. Northern Pacific Ry. Co.*, 35 Mont. 243, 88 Pac. 1009.) At the time of the accident, Moyse was not engaged in performing any duty that was in any manner connected with the use or operation of the railway, and was, therefore, then not a fellow-servant of any of the employees who were at work. (See *Orman v. Salvo*, *supra*; *Russell v. Oregon S. L. Ry.*, 155 Fed. 22, 83 C. C. A. 618; *Louisville & N. R. Co. v. Wade*, 46 Fla. 197, 35 South. 863.)

Assuming that Moyse was at the time of the accident in the discharge of his duties, in the course of his employment, did the company owe him the duty to provide stop-blocks for track 4? We think not. (26 Cyc. 1127, citing *O'Donnell v. Railway*, 89 Mich. 174, 50 N. W. 801; *Atchison etc. Ry. Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; see, also, *Finnell v. Railway Co.*, 129 N. Y. 669, 29 N. E. 825; *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.) In *Batterson v. Railway*, 53 Mich. 125, 18 N. W. 584, it was held that the failure of a railroad company to keep a sidetrack in such repair as to afford a secure footing does not render it liable for a resulting injury to a brakeman. In the case of *Michigan Cent. Ry. v. Austin*, 40 Mich. 247, it was held that the use of worn rails in sidetracks was not negligence. Nor was it negligence on the part of the company in failing to erect stop-blocks at the pit on this sidetrack. (*Chicago etc. Ry. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Hewitt v. Flint etc. Ry.*, 67 Mich. 61, 34 N. W. 659.)

Under the facts of this case, it should have been declared, as a matter of law, that Moyse assumed the risk of the conditions existing at the pit; i. e., lack of blocking or guard at the end of track No. 4. (1 Labatt on Master and Servant, sec. 274; *Choctaw etc. Ry. Co. v. O'Nesky*, 6 Ind. Ter. 180, 90 S. W. 300.) The lack of guards at the end of the track was patent, and this condition would have been disclosed to him by simple observation. (*Michigan etc. Railway Co. v. Smithson*, 45 Mich. 212, 7 N. W. 794; *Benson v. Railway*, 23 R. I. 147, 49 Atl. 689.) Actual ignorance is not sufficient to charge the master; the ignorance must be excusable. (*Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612.) It should also have been declared, as a matter of law, that he assumed the risk of collision. (*Jacobs v. Railway Co.*, 84 Mich. 299, 47 N. W. 669.)

Messrs. Walsh & Nolan, and *Messrs. Miller & O'Connor*, submitted a brief in behalf of Respondent. *Mr. T. J. Walsh* argued the cause orally.

That plaintiff was, at the time of the accident, in the service of the appellant company, and in the caboose in the course of his employment, and that the members of the switch crew were his fellow-servants, is sustained by the following cases: *St. Louis etc. Ry. Co. v. Welch*, 72 Tex. 298, 10 S. W. 529, 2 L. R. A. 839; *International etc. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219. They were referred to, and the principle they announce applied to similar facts, in *Dishon v. Cincinnati etc. Ry. Co.*, 126 Fed. 194. Many of the cases holding that the relation of fellow-servant subsists and that no recovery can be had for the negligence of the train crew are referred to in the opinion in and notes to *Taylor v. Bush*, 6 Penne. (Del.) 306, 66 Atl. 884, 12 L. R. A., n. s., 853, 860, in which the argument and research exhibited in the *Dishon Case* are commended and the principle therein announced adopted. (See, also, *Olson v. Andrews*, 168 Mass. 261, 47 N. E. 90; *St. Louis S. W. Ry. Co. v. Henson*, 61 Ark. 302, 32 S. W. 1079; *Pugmire v. Oregon S. L. R. Co.*, 33 Utah,

27, 126 Am. St. Rep. 805, 92 Pac. 762, 13 L. R. A., n. s., 565, 14 Ann. Cas. 384; *Olson v. M. & S. L. R. Co.*, 76 Minn. 149, 78 N. W. 975, 48 L. R. A. 796.)

If respondent was not on duty, he was in the car by the invitation of and under agreement with appellant company, in the course of his employment. He was in the car in accordance with a custom and usage of the business so universally observed, of such long standing as that knowledge of it and acquiescence in it and approval of it by the appellant company may be assumed. That custom entered into and became a part of respondent's contract of employment. Scarcely any contract of employment was ever entered into that was not affected by the customs and usages prevalent in the business to which the employment related. They enter into and become a part of it as binding and effective as any of its express terms. (See *Northern Pac. Ry. Co. v. Kempton*, 138 Fed. 992, 71 C. C. A. 246.) Even if the custom were suffered merely for the comfort and convenience of the men, the duty of reasonable care would arise under the authority of one of the leading cases relied on by the appellants. (See *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389.)

This appellant company which fitted up the caboose in question for use by its operatives and turned it over to them in the knowledge that others of similar character were habitually used as a sleeping place by crews when away from the home terminal, must be held to have invited the respondent and his associates to use it on the night in question for the same purpose, and to be and remain in and about its yards therein. The following cases will elucidate what is an invitation, as the word is used in the law of the subject being considered: *Sweeney v. Old Colony Ry. Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Alabama etc. Ry. Co. v. Godfrey*, 156 Ala. 202, 130 Am. St. Rep. 76, 47 South. 185; *Bennett v. L. & R. R. Co.*, 102 U. S. 577, 26 L. Ed. 235; viz.: that invitation is inferred where there is a common interest or mutual advantage. There certainly was a common interest and a mutual advantage in the utilization by the operatives of the caboose as sleeping quarters when away from home.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by plaintiff for damages for personal injuries. On August 17, 1906, the plaintiff was in the employ of the defendant company as a conductor. The defendant Doyle was the yard foreman of the company, in charge of other employees in the actual discharge of his duties in directing the movement and disposition of cars in the yards of the company at Butte. Defendant Whalen was also in the employ of the company as foreman having general charge of the yards. At the time of the accident plaintiff was in a caboose of the company which stood on a sidetrack in the yards. The main and sidetracks extend east and west. To the west from the point where the caboose was standing, there was an excavation, about twenty-two feet in depth and forty feet in width. The grade of the tracks inclined sharply to the west, so that a car left standing on any of them without having the brakes properly set would of its own weight move toward the excavation. The main line and one of the other tracks crossed the excavation upon a trestle, but the track upon which the caboose was standing ended at its brink. There was at this point no block or other device to prevent a car standing thereon, if it happened to escape, from being precipitated into the excavation. In addition to the foregoing facts it is alleged that the plaintiff was in the caboose in the discharge of his duties; that the defendant company and its foreman Whalen, in the exercise of reasonable care, could have known, and in fact did know, of the existence of the excavation and the facts stated above, but nevertheless failed to obstruct the said track, or to exercise reasonable or any care to prevent a car proceeding along it from falling into the excavation; that while the caboose was standing on the track the defendant company, through its employees Whalen and Doyle, being then engaged in the discharge of their duties, moved a train of cars upon and along the track toward the caboose and toward the excavation; that they negligently permitted these cars to be upon the track without setting the brakes

sufficiently to prevent them from descending by their own weight at a dangerous rate of speed toward and against the caboose, and that they negligently drove the cars against the caboose where the plaintiff then was, with great violence, disconnecting the brakes thereon, and driving it along the track and into the excavation, whereby plaintiff was injured.

The answer of the company admits that plaintiff sustained certain injuries while in the caboose, but denies that he was at the time in the discharge of his duties as employee of the company. It alleges affirmatively that he was guilty of contributory negligence and that he assumed the risk. The separate answer of defendants Whalen and Doyle interposes the same defenses. As to the affirmative defenses there is issue by reply.

The evidence discloses the following: Plaintiff was at the time of his injury forty-one years of age; he was in good health, and had been in railway service for seventeen years, during the last four of which he had been a conductor on the Montana division of the defendant company's railroad. He resided with his family at Livingston. He ran freight trains from Livingston to Helena, Butte, and Billings. On August 16 he brought train No. 56 from Livingston, arriving at Butte at 11:45 P. M. On reaching the yards he "registered in," that is, he delivered his waybills at the telegraph office of the company, and signed the register after noting the time of his arrival, etc. Upon registering in, his pay ceased until he was "called" to make his return trip. It began again thirty minutes before the hour stated for departure in the call. The brakemen were also off active duty as soon as they had set the hand-brakes on the cars and had disconnected the engine. From that time the train, including the caboose, was in charge of the yard crew. By "yard crew" is meant the foreman in charge and his assistants. The term "called" means that, when the train is ready to leave, the call boy tells the crew to get ready to take charge of the train, and informs them of the time of starting. It is customary for a train crew, when away from home terminals, to sleep in their caboose. It is provided with a "bunk" under the cupola, which

is occupied by the conductor, and a "bunk" in the body of the car, fitted up with cushions, which the brakemen occupy. The cushions serve for mattresses. All the members of a crew furnish their necessary bedclothes. This custom had been observed by train crews for seventeen years. After the yard crew take charge of a train they place the caboose at any convenient place in the yard selected by the foreman, unless there is a siding specially designated for it. There was no such siding in the Butte yards. After the train crew had retired to the caboose on the night of the 16th, but while they were still awake, the yard crew took the train away and switched the caboose over to the track upon which it stood at the time of the accident. This is designated by the witnesses as track No. 4, to the north. On the morning of the 17th the plaintiff was informed at the telegraph office that his train would not be ready to leave until early in the morning of the 18th. He and the rest of the crew, two brakemen, spent the day in the city, returning to the caboose about 5 o'clock. At that time an empty gondola car was standing on the track, five or six car-lengths east of the caboose. The latter was standing about twelve car-lengths east from the excavation. A car-length is about thirty-six feet. The excavation had been made by the Butte Electric Street Railway Company through the yards of the defendant company, to provide a crossing for the electric cars under the tracks of the railroad, the intention being to erect a trestle viaduct for all the tracks of the latter. Prior to the beginning of this work the tracks had rested on a solid embankment. The viaduct had been completed in part, but was not of sufficient width to accommodate all the tracks of the railroad company. As already stated, some of them, including the one occupied by the caboose, ended at the brink of the excavation. A week before the 16th, on a prior trip to Butte, the plaintiff had noticed the excavation, and that men were at work in the construction of the viaduct. The telegraph office of the company was some fifty feet west of the excavation, and upon going to the office to register in, on the evening of the 16th, the plain-

tiff must have passed over the excavation on the completed portion of the viaduct, or have gone around it upon the public road. He must also have pursued one or the other of these courses in order to reach the office on the morning of the 17th, when he went to inquire as to the hour when his train would leave. On the evening of the 17th the crew went to bed in the caboose, about 7 o'clock. At that time the caboose and the gondola were standing as in the morning, held by the hand-brakes. The brakes hold cars so placed if they are set securely and are not disturbed by impact by other cars. The yard crews were to make up two trains that night, one of which was No. 56. About 7:45 two other cars were put upon track 4, to the east of the gondola and against it. One was a gondola and the other a flat car loaded with steel. They were left standing, held by the hand-brakes only. About 9:45 four other cars, loaded with copper, were pushed upon the track from the east by the yard crew and put against the car loaded with steel. The cars thus set together were automatically coupled and were left standing, apparently held securely by the brakes. The yard crew then went to secure other cars. Upon their return a few minutes later all the cars left by them, including the empty gondola and the caboose, had disappeared. The six cars which had been coupled together had in some manner been released and gotten under way, and, colliding with the gondola and caboose, had driven them to the excavation, with the result that the west end of the caboose was precipitated into it. The plaintiff was awakened by the impact, but, supposing that it was produced by the crew in making up his train—hard bumps of that character being not unusual—he did not give it serious attention until the car began to gather speed. He then called to the brakemen and attempted to escape, but was too late. He reached the platform as the car began to descend into the excavation, and as he held on by the hand-bars he was struck by something upon the hip, receiving the injury of which he complains. Whalen was the immediate superior of Doyle. Trains were moved and cars were placed according to Whalen's

directions. Whalen usually went off active duty at 7 o'clock in the evening. At the time of the accident he was at his home, having gone off duty at the usual time. The rules of the company contained the following:

"Rule 13. Employees of the company must devote themselves to its service, attending during the prescribed hours of the day or night, and residing wherever required.

"Rule 14. No employee will be allowed to absent himself from duty without permission from the head of the department in which employed."

"Rule 16. Yardmasters report to the trainmaster, assistant superintendent, or superintendent; perform work ordered by agents; and are in charge of yard work, yard engines and crews, and train and engines while in yards."

Unless a member of a train crew was laid off, or was absent by permission, he was, under rules 13 and 14, required to be within call at all times and ready for duty. So the plaintiff interpreted these rules, and it is not questioned that his view of their meaning was correct. The plaintiff had verdict and judgment. The defendants have appealed from the judgment and an order denying their motion for a new trial.

The complaint is framed upon the theory that the defendant company is liable to the plaintiff, as one of its employees, for injuries received while engaged in the discharge of his duties, through the negligence of other employees, and that the other defendants are liable because they were personally guilty of the acts of negligence which caused the injury. It declares upon the statute which abolishes the fellow-servant rule. (Revised Codes, sec. 5251.) The acts charged as negligence are the handling of the cars by the yard crew in making up the train in such manner as to permit them to escape and collide with the caboose, driving it into the excavation, and the omission by defendants to provide some device, at the brink of the excavation, to prevent the caboose from being precipitated therein, if from any cause it escaped.

The first contention made by counsel is that the evidence is insufficient to justify the verdict, for that it appears that at

the time the plaintiff was injured he was not engaged actively in the discharge of duties for which he was employed by the company, but was a mere licensee upon its property, to whom it and its employees owed no duty other than to refrain from doing him a willful or wanton injury; and hence that no liability can be predicated upon the statute. In support of this contention counsel argue that, while one is in the employ of another under a contract, he is, in a popular sense, an employee during the entire period covered by the contract; yet the rights and duties incident to the relation of master and servant, in a legal sense, do not subsist, except during the time which, under his contract, he must actively devote to the duties of his employment. To make the statement in another way: Unless the servant is at a particular time under the control of the master, giving his time and attention to the particular duties he is employed to do, he is *pro hac vice* a stranger, to whom the master, as such, owes no duty whatever, except such as he must observe toward any other stranger under the social compact.

While the statute has to do exclusively with those persons who sustain toward each other the relation of master and servant, it does not undertake to define who those persons are, but merely imposes certain rights and liabilities upon them, leaving it to the courts to determine when persons have assumed the relation. (Dresser's Employer's Liability, sec. 8.) It is not always easy to determine exactly when the relationship, once established, ceases, and the servant may be said for the time being to be his own master. In *Packet Co. v. McCue*, 17 Wall. 508, 21 L. Ed. 705, the question arose upon the evidence as to whether the employment of the deceased had ended at the time he received the injury. The court said: "It was for the jury to say from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ended at the time of the accident." On this subject Mr. Dresser says: "If a general rule were to be laid down, it might perhaps be that the employment begins when

the servant enters premises or trains in the control of his master for the purpose of reaching the particular place where he is to work. The length of time before or after the hour for beginning work is not a guide." (Dresser's Employer's Liability, sec. 13.)

The facts and circumstances which appear from the statement of the evidence before us furnish support for the inference that, during the entire time when the plaintiff was away from his home terminal, he was, except when notified that his services were not wanted, subject to be called on duty. He was required to be within call, and, as he understood the rules, was subject to discipline if he was not. It is also a fair inference that though he was not under his contract required to occupy the caboose at night, he was nevertheless expected to do so, and not only this, but that he had a right to do so, because it was under all the circumstances a substantial privilege accorded to him under the contract, which the company was not at liberty to withdraw at will. If these inferences are permissible, and we think they are, then the conclusion seems inevitable that he was in the caboose in the course of his employment, and that the members of the yard crew were his fellow-servants, for whose negligence the company is liable under the statute. The cases differ greatly as to whether, under such circumstances as are presented in this case, the relationship of master and servant subsists, and whether or not the servant is entitled to all the benefits of such relationship. As is said in the note to *Taylor v. Bush & Sons Co.*, 12 L. R. A., n. s., 853, they arise in a variety of circumstances. Some of them involve the fellow-servant doctrine, others the assumption of risks, and still others involve consideration of the question whether the master has used ordinary care to furnish a reasonably safe place for the servant to be while at work. In all the cases, however, the essential question to be determined is: Did the relationship of master and servant actually exist at the time of the injury?

In *St. Louis, A. & T. Ry. Co. v. Welch*, 72 Tex. 298. 10 S. W. 529, 2 L. R. A. 839, the plaintiff was the foreman of a bridge

gang in the employment of the defendant. At the time of the accident he was asleep in a car provided by the company for that purpose, which was lying upon a sidetrack. Other employees of the defendant, in operating one of its freight trains, negligently ran it upon the sidetrack, and struck the car in which the plaintiff was, with such violence that plaintiff was seriously injured. The court, after sustaining the contention made by the defendant that the plaintiff was a fellow-servant of the employees operating the train, said: "The plaintiff at the time of the accident was asleep on a car belonging to the company, provided by it for that purpose, which was placed upon its sidetrack. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment, and who are injured during the intervals in which the master has no claim upon his [their?] services."

In *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219, the plaintiff was employed by the railway company by the day as a carpenter. He was on a car of the defendant on his way, with other members of the working crew to which he belonged, from the station where the crew had been at work, to another where similar work was to be done. They had orders to stop in the yards at San Antonio, an intermediate station, to do some repair work. The car was standing on a sidetrack in the yards. The plaintiff, having spent a portion of the evening in the city, had returned to the car, and was engaged in writing a letter. Another employee, in charge of a switch engine, negligently ran it into the car and seriously injured him. The court held that the plaintiff and the employees in charge of the switch engine were fellow-servants. It disposed of the contention that he was not in the employ of the defendant, by saying: "In this case we think it is evident, from the facts testified to by the appellee, that he was, in contemplation of law,

in the employment of the company at the time of the collision. His presence in the car on the sidetrack at the time of the collision can be explained in no other way under the proof. It was only by reason of the fact that he was an employee of the company that he was in the car on the sidetrack at the time he was injured."

In *Dishon v. Cincinnati, N. O. & T. Ry. Co.* (C. C.), 126 Fed. 194, the court discussed somewhat at length the reason which furnishes the basis of the fellow-servant rule, and reviewed exhaustively the cases in which it has been invoked and applied in order to relieve the master from liability. The facts in the case show that deceased was in the employ of the defendant as a section-hand. He boarded with the section boss at the company's section-house. On the evening of the accident, after he had finished his work and eaten his supper, he started with two others to go to the railway station on the opposite side of the track. There was an opening between cars standing on a sidetrack which he had to cross. He had passed through this on his way from work. He and his companions undertook to pass between the cars. One of them passed through in safety; the deceased then attempted to pass through, but while he was making the attempt, the opening was closed by the cars being shoved back by an engine manipulating the cars on the track. The result was that he was crushed and killed. The court held that the death of the deceased was caused by the negligence of his fellow-servants, a risk which he assumed when he entered the employment of the defendant. Touching the question involved here it is said: "There is no good reason for holding that the assumption of risk exists when the servant is doing one thing required of him by the contract, and does not exist when he is doing another thing so required, or that it exists when he is doing a thing required of him by the contract, and does not exist when he is doing a thing which he is simply authorized to do by the contract. Any stopping short, therefore, of making the assumption by the servant of the current risks of his employment as wide as the action on his part contem-

plated by the contract, discredits the principle and reasoning on which the fellow-servant doctrine is based and that doctrine itself. Hence, it is never a test of the application of the fellow-servant doctrine to any given case, whether or not the injury was received by the servant during working hours or when he was at work after working hours. The sole test of its application thereto is whether at the time of the injury the servant was doing something which it was his duty or he had a right to do under the contract. If he was so acting, the doctrine applies; if not, it does not apply." This case was subsequently reviewed by the circuit court of appeals (133 Fed. 471, 66 C. C. A. 345). The judgment was affirmed on the ground that it appeared that the deceased was guilty of contributory negligence in attempting to pass between the cars as he did. The appellate court intimated that, in view of its decision in the case of *Ellsworth v. Metheney*, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, the conclusion of the circuit court that the deceased was still in the course of his employment was erroneous. It did not, however, question the soundness of the rule announced by the circuit court as to the test by which the question when the relation of master and servant ceases must be determined. It may be admitted that the conclusion of the circuit court that the deceased was acting within the scope of his duty when injured was erroneous. We are inclined to think it was. Nevertheless, the rule, as stated, is, in our opinion, a just one, and is fully sustained by the great number of cases cited and examined. Even the briefest notice of these cases would extend this opinion beyond any reasonable limit. We content ourselves by reference to the opinion itself, and to the note to *Taylor v. Bush & Sons Co.*, *supra*, wherein will be found a great number of cases illustrating the conflicting views of the courts. It may be observed of the case of *Ellsworth v. Metheney* that while the appellate court held that the deceased was not at the time of his death in the discharge of the duties of his employment, and hence was not entitled to recover on the theory that he was a servant of the defendant, it held that the case should

have been submitted to the jury upon the question whether the defendant had been guilty of negligence in installing a dangerous apparatus in a place where his employees had a right to be as licensees by his implied consent, without properly guarding it. The apparatus consisted of a highly charged electric wire strung on brackets along the wall of a dark entry in a mine in which the deceased was working. The entry was not in the part of the mine where deceased was at work, but the men, with the knowledge of defendant, were accustomed to use it when they came from their rooms during refreshment and rest at the noon hour. The deceased had passed through it to the room of a fellow-workman. On his return he came in contact with the wire and was killed. We have referred to this case because counsel for defendants have cited it in support of their contention, and also because of the further contention made by them that the plaintiff was in the caboose as a mere licensee.

The conclusion we have reached, that the plaintiff was in the caboose for the purpose of being within call by the defendant company to go on duty, and was therefore in the discharge of his duties, involves the conclusion, also, that he was not there as a mere licensee, and that the rule of liability declared by the statute applies to the case made by the evidence. It is not at all conclusive that the pay of the plaintiff ceased when he registered in on his arrival at Butte. In the light of the evidence, under the contract of employment it was within the contemplation of both parties that he should hold himself subject to the order of the company after his pay had ceased; and it seems clear that a contract including a stipulation of this kind, express or implied, is not open to any legal objection.

Under the circumstances disclosed, the obligation was upon the company to use ordinary care to provide a reasonably safe place for the use of plaintiff, and to maintain it in that condition. The evidence furnishes ample support for the conclusion that it failed to discharge its obligation in this regard; for, though it may be conceded for present purposes that it was

not required to provide a block or other device to prevent escaping cars from falling into the excavation and that the yards were otherwise in a reasonably safe condition, it was nevertheless bound to see that the yard crew took ordinary precaution to maintain this condition, and not to allow cars to escape and collide with the caboose so as to expose the plaintiff to additional peril. The evidence tends to show that but for the escape of the loaded cars, which the ordinary precaution of securely setting the brakes would have prevented, the accident would not have occurred. For this lapse of duty the defendant company is liable, as is also the defendant Doyle; for, for the time being, he stood in the place of the company, and it was his personal duty to see that the proper precautions were observed. But we are of the opinion that a separate motion for nonsuit, made on behalf of Whalen, should have been sustained. It is true that he was foreman of the yards and had general direction of the operations there, as the immediate superior of Doyle. Yet he was off duty at his home at the time of the accident. He was not, under the evidence, responsible for the unguarded condition of the excavation. It was a primary duty of the company to take precaution with reference to it; and under the rule he was not required to do anything further than to direct the movement of cars and observe the precautions attending the performance of that duty. And since he was not actively on duty in this regard at the time of the accident, he cannot be held either for personal neglect of duty nor as an intermediate agent of the company.

Contention is made that the charge of the court was erroneous in that, while two acts of negligence are charged conjunctively, in the complaint, to-wit, the omission to guard the excavation and the negligence of the employees in handling the cars, it instructed the jury that plaintiff could recover upon a showing of fault in either respect. This point was not made in the trial court; but, even so, the defendants cannot complain. Let it be conceded that two separate causes of action are stated. The instructions were formulated upon the theory that if the

jury found fault in the first respect only, they should find against the company only; but if they found fault in the second respect, they should find against all of the defendants. Since the finding was against all of the defendants, we presume that they found negligence in the handling of cars. Viewed in its first aspect, the complaint charges the violation of a primary duty only, which did not fall within the scope of the employment of the yard crew, as we have already pointed out in determining the liability of Whalen. To this aspect of the case the statute has no application, because the fault was not that of a fellow-servant of plaintiff. In its second aspect the case falls under the statute. Advantage of this fault, if it be such, should have been taken by special demurrer. It is not a valid objection to the judgment, so far as concerns the company, that the jury were permitted to find upon either view of the case. Although several acts of negligence are alleged in the complaint, proof of all is not required. A recovery will be sustained upon proof of any one or more of them. (14 Ency. of Pl. & Pr. 345; 29 Cyc. 587; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988.) Upon the evidence the jury may or may not have concluded that the company was negligent in omitting to block the track. Whether it did or not is not material. Their finding that there was negligence in the handling of cars is sufficient to sustain the verdict.

A similar contention is made with reference to the allegations that the defendants negligently permitted the cars to be upon the track without setting the brakes, and that they negligently drove the cars toward and against the caboose. The contention is really based upon a technical objection to the form of the statement in the complaint. The evidence tends to show that the cars escaped after they were left standing on the track. This sustains the allegation from any point of view. If the defendants left the cars in such an insecure condition that they escaped and collided with the caboose, the result was that they negligently drove them and thus caused the collision. They put the effective cause of the accident in mo-

tion. It was one and the same cause whether the cars moved of their own weight or were moved by an engine.

It is said that the plaintiff knew and understood the danger of the situation, and therefore, by going to sleep in the caboose, he assumed the risk. There is no merit in this contention. That the place was not safe is apparent. He assumed the risk of all dangers ordinarily incident to the handling of cars under the circumstances as he saw them. Among these was a likelihood of injury due to the bumping of cars against the caboose during the making up of a train; but he had no cause to think when he went into the caboose that the yard crew would omit to observe ordinary precautions to secure the cars by means of the brakes, and thus add to the perils which he did assume. He was entitled to assume, looking to all the conditions as they actually were, that the place was reasonably safe. It was not apparent to him, nor was he bound to know, that the yard crew were going to be so negligent in the course of their employment that he would certainly be injured if he remained in the caboose. The true test to be applied is not whether the injured servant exercised reasonable care to discover the dangers, but whether the danger was known or plainly observable. (*Choctaw etc. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701; *Anderson v. Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884.) The evidence fairly presented a case for the jury on this point.

Fault is found with the charge of the court in many particulars. We have given our attention to them, but find no prejudicial error in any of them. Nor do we find that the court omitted any instruction which it should have given. Most of counsel's criticisms are predicated upon the assumption that the theory of the case adopted by the trial court, as to the liability of the defendants upon any aspect of it, was erroneous. What has been said in the discussion of the principal contention disposes of all of these criticisms.

As to the measure of damages, the court gave, among others, the following instruction: "If you find for the plaintiff, and

should further find that the capacity of the plaintiff to labor or earn money has been reduced by reason of his injuries, you should award him such sum on that account as will purchase an annuity equal to the difference in the amount he could earn annually in view of his injuries and the amount he could have earned annually were it not for his injuries, keeping in mind, however, any diminution in his earning capacity that may ensue on account of his advancing years or from other causes if the injury had not occurred." It is said that the jury were here told that, having determined the yearly loss of earnings by plaintiff by reason of his impaired capacity, the cost of an annuity for a like amount was the standard by which they should measure the amount of their verdict. As an abstract statement of law there is no fault to be found with the instruction. What it would cost to buy an annuity for the amount which a person in the condition in which plaintiff appeared to the jury to be at the time of the trial, is as nearly an exact standard as can be laid down. Of course, in ascertaining the amount of the annuity, the jury must take into consideration probable diminution of earning capacity due to causes other than the injury itself, such as advancing age, the apparent present state of plaintiff's health, the apparent permanence or lack of permanence of his disability, his habits of life, and the possibility that his employment would have been continuous, and the like. These are the conditions referred to in the latter part of the instruction, and, if any fault is to be found with it, it lies in the fact that these conditions are not enumerated with more particularity. In a later instruction, however, given at the request of the defendants, after referring to the evidence touching the use they might make of mortality and annuity tables, the court carefully called the attention of the jury to these particular conditions, saying to them that these tables were not to be considered as an absolute basis for their calculations, but must be used by them as a guide only so far as the facts before them corresponded to those from which the tables were computed. This brings the instructions within the

rule as laid down in *Bourke v. Butte Electric Ry. Co.*, 33 Mont. 267, 83 Pac. 470, as explained in *Lewis v. Northern Pacific Ry. Co.*, 36 Mont. 207, 92 Pac. 469, and *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837.

Other alleged errors have been examined, but none of them have been found sufficiently meritorious to require special notice.

The judgment and order are affirmed as to the defendants railway company and Doyle; as to the defendant Whalen they are reversed, and the cause is remanded, with directions to the district court to dismiss the action as to him.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. GILLETT, RESPONDENT, v. CRONIN ET AL.,
APPELLANTS.

(No. 2,827.)

(Submitted May 18, 1910. Decided May 23, 1910.)

[109 Pac. 144.]

*Counties—Townships—Changing Boundaries—Powers of Board
of Commissioners.*

Counties—Board of Commissioners—Powers.

1. The board of county commissioners is a body of limited jurisdiction, and before a power may be exercised by it, the authority for the action must be found written in the law, or it must be clearly implied from some express grant of power.

Same—"Township"—Definition.

2. A township is a subdivision of a county.

Same—Townships—Changing Boundaries—Extent of Power of Board of Commissioners.

3. *Held*, that while the board of county commissioners has the power, under section 2894, Revised Codes, to change the boundaries of a county, or to abolish a township altogether, its authority in this respect is limited to the extent that there must always be at least two townships in each county; hence in abolishing all but one township in a county the commissioners acted in excess of their jurisdiction.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

MANDAMUS by the state, on the relation of A. H. Gillett, against J. H. Cronin and others, county commissioners of Silver Bow county. From a judgment granting the writ and an order denying a new trial, defendants appeal. Affirmed.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, submitted a brief in behalf of Appellants. *Mr. Hall* argued the cause orally.

In behalf of Respondent, there was a brief and oral argument by *Mr. N. A. Roterling*.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Mandamus to compel the board of county commissioners of Silver Bow county to appoint a justice of the peace in and for South Butte township.

Prior to September 22, 1908, there were six organized townships in Silver Bow county, *viz.*, Silver Bow, South Butte, Meaderville, Walkerville, German, and Red Mountain. On the last-mentioned date the board of commissioners made an order abolishing all the townships excepting Silver Bow, and extending the boundaries of that township, so that they became coterminous with the boundaries of Silver Bow county. This order was made to become effective on the first Monday of January, 1909. At the general election held in November, 1908, there were but two justices of the peace elected in the county; that is, two for the newly extended township of Silver Bow. In February, 1909, this proceeding was commenced. The district court, after trial, directed the peremptory writ to issue, and, from the judgment and an order denying a new trial, the defendant board appealed.

May the board of county commissioners in any county of this state limit the number of townships in that county to one?

There is not any authority directly bearing upon the question to be found; but, since the board of county commissioners is one of limited jurisdiction, before a power is exercised by it, the authority for the action must be found written in the law, or it must be clearly implied from some express grant of power. (*State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092.)

Is the authority sought to be exercised by the appellant board expressly granted, or is it implied? The only express grant of power referable to the subject now under consideration is found in section 2894, Revised Codes, which provides: "The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: * * *

(2) To divide the counties into townships, school, road and other districts required by law, change the same and create others as convenience requires." The power to divide a county into townships can scarcely be said to authorize the creation of a single township from an entire county, and other provisions of the Codes seem to indicate that the legislature did not intend such a result. Section 9589 provides that, if the defendant in a criminal case pending in a justice of the peace court makes it appear by affidavit that he cannot have a fair and impartial trial in the particular township where the cause is pending by reason of the prejudice of the citizens of that township, "the cause must be transferred to a justice of the township where the same prejudice does not exist." The provisions of our constitution and other provisions of our Codes sufficiently demonstrate that a change of venue cannot be had from a justice of the peace court of one county to a justice of the peace court of another county, and, by creating but a single township in a given county, the commissioners of that county could nullify the provision of section 9589 above.

Furthermore, in the absence of anything to indicate a contrary intention, we must assume that the framers of our constitution and the members of the legislature in speaking of municipal townships used the word "township" in the ordinary, popular sense of the term, according to the context and the

approved usage of the language. This is the rule of construction provided by our Codes. (Section 8070.) A township is a subdivision of a county. (Anderson's Law Dictionary; *Chicago & N. W. R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840, 6 N. W. 607; Abbott's Law Dictionary; 8 Words & Phrases, 7032.) To constitute an entire county a single township can scarcely be said to be a division of the county into townships, and such arrangement would apparently defeat the purpose of section 9589 above; while, on the contrary, if there be two or more townships in a county, the accepted definition of the word "township" is observed, and every provision of the Code touching the subject is given full force and effect.

Since we are left to determine the legislative intent in order to answer the inquiry submitted above, and there does not appear to be, in terms, any express grant of the power sought to be exercised, it would seem to do violence to the most elementary rules of statutory construction to assume that the legislature intended a construction to be placed upon the language employed in section 2894, which would render nugatory the right guaranteed to a defendant by section 9589. While there is ample authority in the board to change the boundaries of a township, or to abolish a township altogether, a due regard for other provisions of the Codes requires that such authority be exercised with this limitation: That there shall always be at least two townships in every county. In abolishing all the townships in Silver Bow county but one, the board exceeded its authority, and its order of September 22, 1908, is void.

We do not find any error in the record. The judgment and order are affirmed.

Affirmed.

- MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

GIOVANETTI, APPELLANT, v. SCHAB, RESPONDENT.

(No. 2,826.)

(Submitted May 18, 1910. Decided May 23, 1910.)

[109 Pac. 141.]

*Landlord and Tenant—Oral Leases—Nature of Occupancy—Evidence—Trial—Amendment of Pleading—Discretion.***Trial—Pleadings—Amendment—Discretion.**

1. The allowance of an amendment to defendant's answer, during trial, was within the sound legal discretion of the district court; in the absence of a showing of abuse thereof, its action will not be disturbed on appeal.

Same—Amendment of Pleadings—Objection—When Too Late.

2. An objection to the allowance of an amendment of the answer, in an action for unlawful detainer, on the ground that it was not verified, not made until after the amendment had been allowed, was too late.

Landlord and Tenant—Oral Leases—Nature of Occupancy—Evidence.

3. Evidence in an action for rent *held* to justify a verdict that defendant's occupancy was under an oral lease from year to year, and not under one from month to month; plaintiff could not, therefore, rightfully increase the amount of the rental during the term of such lease.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Celestina Giovanetti against W. E. Schab. Judgment for defendant, and plaintiff appeals from an order denying her a new trial. Affirmed.

In behalf of Appellant, there was a brief and oral argument by Mr. John A. Smith.

Messrs. Kirk, Bourquin & Kirk submitted a brief in behalf of Respondent, and Mr. W. R. Kirk argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

This case originated in a justice of the peace court in Silver Bow county. It comes to this court on appeal from an order of the district court of that county refusing to grant the plain-

tiff's motion for a new trial, after judgment entered upon the verdict of a jury in that court. The object of the action was to recover \$200 as rent for a certain store building situated on East Park street, in the city of Butte, for the month beginning October 10, 1908, and ending November 10, 1908, together with the possession of the building. The building, however, was vacated by the defendant before the trial, so that the only question at issue was whether the plaintiff was entitled to recover the rent.

It is alleged in the complaint that the plaintiff, by an oral lease made on or about the tenth day of July, 1908, leased and let to the defendant the said building or storeroom for one month, and from month to month thereafter, at a rental of \$40 per month, payable in advance; that on September 11, 1908, the terms of the lease were, by written notice served on defendant, changed, and the rent increased to \$200 per month, the change to take effect October 10, 1908; that defendant continued in possession of the premises, and on October 13, 1908, plaintiff demanded the increased rental or the possession of the premises, but defendant failed to vacate the storeroom or pay the rent. The defendant by answer admitted being in possession and the service of the two notices mentioned in the complaint, and denied all other allegations thereof. He alleged affirmatively that on the tenth day of July, 1906, he hired the building in controversy from one Sam De Poli, a prior owner, at a monthly rental of \$40, for a period of one year; that De Poli, on January 31, 1907, conveyed the premises to one Golubin, subject to said lease, and Golubin agreed that defendant should retain the possession of the premises upon the same terms and conditions; that plaintiff accepted rent for the months of July, August and September, 1908, at the rate of \$40 per month, and was tendered the same sum for the month beginning October 10, but refused to accept the same. These issues were made up in the justice of the peace court. During the course of the trial in the district court the defendant was allowed, over plaintiff's objection, to amend his answer by interlinea-

tion so as to show that on July 11, 1908, he had entered into an agreement with Gobulin by which he (defendant) might remain in the possession of the building for a year from that time, upon the same terms as those under which he had previously occupied it.

The allowance of the amendment was a matter within the sound legal discretion of the district court, and we find no abuse of such discretion. It is, however, argued by counsel for the plaintiff that, as the statute requires the pleadings in actions of forcible entry and unlawful detainer to be verified, this amendment was improperly allowed, because not verified. The objection of want of verification was not made, however, until after the order allowing the amendment had been entered. It was then too late. In any view of the matter, we do not think the plaintiff suffered prejudice from the action of the court, for the reason that the amendment of the answer was unnecessary.

The testimony on the part of the plaintiff tended to show that when her agent, H. Giovanetti, collected of the defendant the sum of \$40 as rent for said premises in the month of July, he then informed the defendant that the rent for the succeeding months would be at the rate of \$50 per month; that the defendant assented thereto; that the latter, however, refused to pay \$50 the following month, and she finally accepted \$40 as the rent for the month of August; that on September 11 the defendant again refused to pay \$50, whereupon he was served with notice that from and after October 10 the rent would be \$200 per month; and that on the eleventh day of October the defendant tendered the sum of \$40 as rent, which was refused.

The defendant testified: "My first dealing for that building was on the tenth day of July, 1906, and was with Sam Depolie. My lease from Mr. Dublin was the building. It was a year to year lease. He said I could have the building as long as I paid him \$40 on it; he would give me the lease every year from year to year at \$40 per month. My agreement with Mr.

Doublin was to rent the building from year to year at \$40 per month. I leased the building from Mr. Doublin. He said he would lease the building to me at \$40 per month on a year to year lease, and I could have the building as long as I paid the rent. Mr. Goublin bought it in January, 1907. About July 10 he said he had bought the place from his father in law, Mr. Doublin, and he said that everything would go along as usual. He said that his father in law had spoken to him in regard to the rent being \$40 per month and would continue on so. I said all right. Mr. Doublin said that they would continue to rent me the building at \$40 per month. He said that the lease would continue on the same as it had been with the old gentleman, at \$40 per month, and the lease was on the building. Q. What agreement did you have with Gobulin after having held the lease after July 10, 1908, for one year? A. Why, the agreement was as long as—I could continue over from year to year as long as I continued to pay the rent of \$40 per month. I saw Mr. Gobulin along on or about July 10, 1908. I was negotiating for the purchase of this place. I paid down \$200, and I made an agreement to buy. I had a talk with Mr. Giovanetti on July 13, about noon. He said he bought the building and wanted the rent and everything as it had been. Now, these are his words, he says: 'That man told me that he intended to vacate. But,' he says, 'you can stay where you are at \$40 per month.' He said that the rent would continue the same and I could stay with the same agreement, at \$40 per month. Mr. Gobulin said he had sold the building to Mr. Giovanetti, on the 11th or 13th of July. I made an agreement with Mr. Guibilon for the purchase of this building on May 27, 1908. At that time I paid him down \$200. After the month of May, 1908, when I had entered into the contract to purchase this building, I remained in possession of it after that, under the agreement to buy it. The reason that I did not complete my payment and make the purchase as I had agreed to do was because he sold it to Mr. Giovanetti. I told Mr. Giovanetti of the lease I had with Mr. Guibilon, when I paid him

the first month's rent. At that time when I gave the check for \$40 I told him of the agreement I had with Guibilon. After my contract of purchase and before July 10 or 11 I did not enter into any agreement with Mr. Guibilon for a lease of the building; but I had an agreement to buy, and I expected to buy the building. I forget whether it was the first or second check or payment that Giovanetti spoke about the \$50, and I told him that I had a year to year lease at \$40. He said that I could have the building at \$40 a month, just the same as with Guibilon; that I could stay there as long as I wanted it at \$40 a month. I did not pay Guibilon any rent after I had made the agreement with him for the purchase of the building. When I made the agreement to purchase I paid him from the 10th of May to the 10th of June. I did not pay on the 10th of July on account of the agreement I had to buy the building. Q. Did you ever get that money (\$200) back, or any part of it? A. No. (Plaintiff's Counsel:) I object to that as immaterial and move to strike out the answer. A. They kept \$200 of my money, and they kept it, and now they say I have not paid the \$40 for the month of July. (Plaintiff's Counsel:) I object to the statement as being improper, and move to strike it out. (The Court:) Overruled"—to which ruling the plaintiff excepted.

H. Giovanetti, the agent of plaintiff, stated that the defendant never told him that he had a lease from Mr. Guibilon at \$40 per month, for one year from the 10th of July, 1908; and that he never stated to the defendant that he could remain in possession as long as he wanted to, at the rate of \$40 per month under the same terms as he had with Mr. Guibilon.

Guibilon testified that he did not lease the premises to the defendant on the tenth day of July, 1908, for one year at the monthly rental of \$40 per month, and that he never at any time leased the premises to the defendant for the term of one year. He also testified that he knew of no lease from Mr. Dublin, the prior owner, to the defendant, and that he never told him that he had such a lease.

The parties to the action and the persons mentioned in the testimony are evidently of foreign extraction, and we find what is apparently the same name spelled in different ways in the record. But we believe we are correct in saying that the first owner of the building was Doublin (De Poli, Depolie), the father in law of Guibilon (Golubin, Gobulin, Goubilin, Goubilin), the second owner, who transferred to plaintiff.

It is contended by counsel for the appellant that the matter of the agreement between defendant and Guibilon, for the purchase of the building, in May, 1908, should not have been brought to the attention of the jury; but we find no timely objection to the questions which called out the testimony. We regard the evidence on that point as immaterial, and think the court was correct in limiting the cross-examination on the subject. However that may be, appellant now maintains that the agreement to purchase terminated any lease the defendant may have had up to that time. He may not make use of the testimony for this purpose and still insist that it has no proper place in the record. We shall refer to the contention hereafter.

It is urged that the evidence is insufficient to justify the verdict. Appellant's position is that the testimony discloses a lease from month to month, which could be terminated or changed on fifteen days' notice; while respondent argues that there is testimony to warrant the jury in finding that defendant had a lease for a year or from year to year.

It may be conceded that, if the defendant held under a lease from month to month, the plaintiff was entitled to recover and the jury should have rendered a verdict in her favor in accordance with instruction No. 1, wherein the court instructed them to that effect. Section 5228, Revised Codes, reads as follows: "A hiring of real property, other than lodgings and dwelling-houses, in places where there is no usage on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring." The property in question was not a lodging or dwelling-house. There is no testimony of any usage on the subject. Therefore, when defend-

ant entered on July 10, 1906, according to his testimony, his lease ran for at least a year from that date. Indeed, he says his agreement with Dublin was "to rent the building from year to year at \$40 per month." In January, 1907, before the first year had expired, Guibilon purchased the property from Dublin and told defendant that the lease would continue on the same as it had been with Dublin, at \$40 per month. At some time during the ownership of Guibilon (it does not appear exactly when), the latter agreed with defendant that "he could continue over from year to year, as long as he continued to pay the rent at \$40 per month." It appears that on May 27, 1908, defendant was still in possession under Guibilon, paying rent at the same rate, and this must have been in the second year of his tenancy under the latter. If the original agreement with Guibilon was made in January, 1907, the second year of the lease would not expire until January, 1909; and, if it was made later, then it would expire at a correspondingly later date. In any event, the second year would cover the month from October 10 to November 10, 1908. When plaintiff purchased the property, her agent, who appears to have had charge of its management, told defendant that "he wanted the rent and everything as it had been." He said that "he could stay with the same agreement at \$40 per month." Defendant testified: "I told Giovanetti of the lease I had with Guibilon when I paid him the first month's rent. * * * I told him I had a year to year lease at \$40. He said that I could have the building at \$40 a month just the same as with Guibilon; that I could stay as long as I wanted it at \$40 a month." It is true that this testimony was all contradicted; but we think there was a substantial conflict, and the jury evidently believed it. Assuming that it is true, the third year of defendant's lease had not expired in October, 1908, and plaintiff could not rightfully increase the amount of the rental as she attempted to do. (See *Brill v. Carsley*, 2 Cal. App. 331, 84 Pac. 57.)

It is also urged that the evidence shows that defendant's lease from Guibilon had been abandoned by mutual consent,

before the building was sold to plaintiff, and that at that time the defendant was holding under a contract to purchase. We do not think the evidence justifies this conclusion. If the defendant's evidence is true, he did not so understand, because he informed plaintiff's agent, immediately after the purchase by her, that he had a lease from year to year, and the agent consented that the same might continue in force.

The order of the district court is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

PEARCE, RESPONDENT, v. BUTTE ELECTRIC RAILWAY
CO., APPELLANT.

(No. 2,835.)

(Submitted May 20, 1910. Decided May 24, 1910.)

[109 Pac. 275.]

*Actions Against Corporations—Incorporation—Sufficiency of
Complaint—Formal Prayer for Judgment—When Unneces-
sary.*

Corporations—Actions Against—Incorporation—Sufficiency of Complaint.

1. The complaint in an action against a corporation alleging that the defendant was a corporation was sufficient to show that it had the legal capacity to be sued; the failure to allege the place of its incorporation did not render the pleading insufficient.

Default Judgment—Absence of Formal Prayer for Judgment—Scope of Relief.

2. Where the complaint in a personal injury action, to which defendant failed to answer, contained language showing the limits of plaintiff's claim, to-wit: That he had been damaged in a certain sum—the absence of a formal prayer for judgment did not deprive the court of power to enter judgment. The defendant could not have been misled by the language employed; it served the same practical purpose as a formal prayer, and was sufficient.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by James Pearce against the Butte Electric Railway Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

In behalf of Appellant, there was a brief by *Mr. W. M. Bickford, George F. Shelton*, and *Mr. Charles A. Ruggles*, and oral argument by *Mr. Ruggles*.

A complaint against a defendant named as a corporation which does not sufficiently and clearly allege the corporate capacity of such defendant is open to attack on general demurrer as not stating a cause of action. A failure to make such allegation is fatal to the complaint. (*Oroville etc. Ry. Co. v. Plumas Co.*, 37 Cal. 360; *Loup v. Cal. So. R. Co.*, 63 Cal. 99; *People v. Central Pacific R. Co.*, 83 Cal. 393, 23 Pac. 303; *State v. Chicago etc. R. Co.*, 4 S. D. 261, 46 Am. St. Rep. 784, 56 N. W. 894; *Miller v. Pine Min. Co.*, 2 Idaho, 1206, 35 Am. St. Rep. 289, 31 Pac. 803.) It is not necessary, under the decisions, to go into the methods and process of incorporation, but it is held practically essential in all instances to allege the fact that the defendant is a corporation organized and existing under the laws of a particular jurisdiction, naming it. (*Lake Erie etc. R. Co. v. Griffin*, 8 Ind. App. 48, 52 Am. St. Rep. 465, 35 N. E. 396; *Bank of Sun City v. Neff*, 50 Kan. 506, 31 Pac. 1054; *Dodge v. Minnesota Plastic Slate Roofing Co.*, 14 Minn. 49; *Territory v. Virginia Road Co.*, 2 Mont. 96; *Stoddard v. Onondaga Annual Conference*, 12 Barb. (N. Y.) 573; *Houston Waterworks v. Kennedy*, 70 Tex. 233, 8 S. W. 36; *Saunders v. Sioux City Nursery*, 6 Utah, 431, 24 Pac. 532.)

In a default case, where there is no answer on file, there cannot be any relief granted by a judgment or decree, unless it is specifically asked for in the complaint. (*Staacke v. Bell*, 125 Cal. 309, 57 Pac. 1012; *McFarland v. Martin*, 144 Cal. 771, 78 Pac. 239; *H. B. Claflin Co. v. Simon*, 18 Utah, 153, 55 Pac. 376.) There can be no relief granted where none is prayed for in the complaint. (*Kelly v. Downing*, 42 N. Y. 71; *Hasbrouck v. New Paltz H. & P. Tr. Co.*, 98 App. Div. 563, 90 N. Y. Supp. 977; *Russell v. Shurtleff*, 28 Colo. 414, 89 Am. St. Rep. 216,

65 Pac. 27; *Graves v. Wallace's Admr.*, 4 Ky. Law Rep. 452.) When a judgment is rendered upon the default of a defendant, the recovery must follow the prayer of the complaint. (*Lowe v. Turner*, 1 Idaho, 107.)

In behalf of Respondent, there was a brief by *Messrs. Mackel & Meyer*, and oral argument by *Mr. A. Mackel*.

That the complaint fails to allege under what law defendant corporation was organized is not a fatal defect. (*Jones v. Pacific Dredging Co.*, 9 Idaho, 186, 72 Pac. 956; *Stoddard v. Onondaga Annual Conf. M. P. C.*, 12 Barb. 573; *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106; *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510.)

While the prayer to the complaint may be informal and not according to the usual form, it satisfies the Code provision that there shall be a prayer (Revised Codes, sec. 6532), and also is sufficient to satisfy that provision of the Code that the relief shall not exceed the demand of the complaint. Mere informality of the prayer is not such a defect as to affect the validity of a complaint. (16 Ency. of Pl. & Pr. 785.) A complaint in tort which concluded as follows: "To the damage of the plaintiff," was held sufficient prayer for relief. (*Louisville N. A. & C. Ry. Co. v. Smith*, 58 Ind. 575.) "The prayer for relief forms no part of the statement of the cause of action; and it is unimportant unless there is ambiguity in such statement. A bad prayer for relief or a prayer for improper relief will not vitiate a pleading which is otherwise sufficient. The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted." (31 Cyc. 110, and cases cited; *Pomeroy's Code Remedies*, 4th ed., sec. 471; *Minneapolis R. L. & M. Co. v. Brown*, 99 Minn. 384, 109 N. W. 817; *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56; *McGillivray v. McGillivray*, 9 S. D. 187, 68 N. W. 316.)

MR. JUSTICE SMITH delivered the opinion of the court.

This is the second appeal in this case. (See 40 Mont. 321, 106 Pac. 563.) The present appeal is from the judgment here-

tofore entered against the defendant. It is now contended that the complaint does not state facts sufficient to constitute a cause of action, for the reason that, while there is an allegation therein to the effect that the defendant is a corporation, there is no averment showing where or under what law its corporate capacity was established. The second contention is that the court erred in rendering judgment, for the reason that there is no prayer in the complaint for any relief or for any judgment.

1. Both propositions are extremely technical. In so far as the first is concerned, we think it is without merit. The complaint does aver that the defendant is a corporation. This allegation is sufficient to show that it had the legal capacity to be sued. We think this is all that is required. It would seem to be unnecessary for the plaintiff to inform the defendant of the place of its incorporation. It must of necessity be better informed on that point than is he.

2. The last paragraph of the complaint reads as follows: "That, by reason of the premises, plaintiff has been injured and damaged in the sum of two thousand (\$2,000) dollars, and his costs herein necessarily expended." Our attention is called by appellant's counsel to section 6713, Revised Codes, which reads as follows: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." It is argued that where there is no answer on file, as in this case, there must of necessity be a prayer for judgment, otherwise there can be no judgment entered. Numerous cases are called to our attention by the learned counsel, which are supposed to sustain their contention; but we think the better rule to be adopted in this state is that, if there be in the complaint language showing the limits of plaintiff's claim, so that the defendant may not be misled, such an allegation serves the same practical purpose as a formal prayer for judgment and is sufficient. (See *Tuolumne County Water Co. v. Water Co.*, 10 Cal. 194; *Paige v. Barrett*, 151

Mass. 67, 23 N. E. 725; *Butts v. Phelps*, 90 Mo. 670, 3 S. W. 218; *Garmany & Son v. Savannah G. Co.*, 80 Ga. 578, 7 S. E. 104.) In the case at bar the defendant was informed of the amount of damages which plaintiff claimed to have sustained, to-wit, \$2,000. After the default of the defendant was entered, the court proceeded to hear evidence on behalf of the plaintiff and ordered judgment in the sum of \$1,000. We think that the only reasonable interpretation which may be placed upon the allegation quoted is that the purpose of the action was to recover damages in a sum not exceeding \$2,000. It cannot be thought that the action was commenced for any other purpose or without purpose.

The judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

DAVIDSON, RESPONDENT, v. O'DONNELL ET AL., APPELLANTS.

(No. 2,829.)

(Submitted May 19, 1910. Decided May 28, 1910.)

[110 Pac. 645.]

Justices' Courts—Appeal—Notice—Service—Waiver—Action on Official Bond—Defense—Evidence—Admissibility.

Justices' Courts—Appeal—Notice—Service—Waiver—General Appearance.

1. *Held*, that where plaintiff, having obtained judgment in a justice of the peace court, asked for and obtained leave, on appeal by defendant to the district court, to file a supplemental complaint, he, by his general appearance, waived any defect in the service of the notice of appeal.

Same—Action on Official Bond—Defense—Evidence—Admissibility.

2. In an action against a justice of the peace and the sureties on his official bond, for alleged misconduct on the former's part in falsely marking a notice of appeal as filed two weeks later than it was actually filed, by reason of which wrongful act plaintiff's appeal was dismissed and he compelled to pay the amount of the judgment appealed from

by him, it was error to exclude from evidence a minute entry of the district court which disclosed that the party who asked to have the appeal dismissed, because of untimely service of the notice of appeal, had waived such defect by his general appearance. If notwithstanding the justice's wrongful act the district court acquired jurisdiction of the appeal, by reason of the waiver, his act was not a proximate, or any, cause of the dismissal, and hence the evidence thus excluded would have amounted to a complete defense in the action on the justice's official bond.

Appeal from District Court, Sanders County; Henry L. Myers, Judge.

ACTION by James Davidson against D. O'Donnell, as justice of the peace in and for Thompson township, Sanders county, and the United States Fidelity & Guaranty Company. Judgment for plaintiff. Defendants appeal from an order denying them a new trial. Reversed and remanded.

Mr. Harry H. Parsons, and Messrs. Gunn & Rasch, submitted a brief in behalf of Appellants; oral argument by Mr. T. A. Mapes.

In behalf of Respondent, there was a brief by *Mr. Elmer E. Hershey.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In May, 1906, appellant O'Donnell was a duly elected, qualified and acting justice of the peace in and for Thompson township, Sanders county, Montana; and at that time there was pending in the court of such justice of the peace an action wherein Alden B. Bailey was plaintiff, and James Davidson, this respondent, was defendant. Such proceedings were had in that action in the justice of the peace court that on May 17, 1906, Bailey recovered a judgment against Davidson, and Davidson, desiring to appeal therefrom to the district court, filed with the justice of the peace his notice of appeal, served the notice upon counsel for Bailey, executed and filed a proper undertaking on appeal, paid the fees for transcribing the justice's record and for docketing the appeal in the district court, and the

papers were transmitted to, and the cause docketed in, the district court on June 11, 1906. On September 10, 1908, Bailey moved the district court to dismiss the appeal, apparently upon the sole ground that the notice of appeal had not been filed with the justice of the peace before it was served upon him (Bailey) or his counsel; and in support of his motion he presented to, and filed with, the district court the notice of appeal, which had been overlooked by the justice of the peace in transmitting the papers, and also a supplemental transcript from the justice's docket, showing that the notice of appeal was filed with the justice of the peace on June 8, 1906. On October 7, 1908, the district court sustained the motion and dismissed Davidson's appeal, and Davidson thereupon paid to Bailey the amount of the judgment, with interest and costs, and then brought this action against O'Donnell and the surety upon his official bond, and in his complaint, after setting forth the foregoing facts more in detail, alleges that his notice of appeal was filed with O'Donnell on May 22, 1906, and served upon counsel for Bailey on May 23; but that O'Donnell, as such justice of the peace, willfully, falsely and erroneously indorsed said notice of appeal as filed June 8, 1906, and in the supplemental transcript falsely and erroneously certified that such notice of appeal was filed on June 8, 1906; and by reason of these wrongful acts of O'Donnell, his (Davidson's) appeal was dismissed and he was compelled to and did pay Bailey the full amount of the judgment. It is then alleged that Davidson has a good and valid defense to Bailey's cause of action, but by reason of these wrongful acts of O'Donnell, he has been damaged in the sum of \$430.81, for which amount, with interest and costs, judgment is demanded. O'Donnell and the surety company filed a joint answer, in which they deny that the notice of appeal was filed on May 22; they deny any carelessness, negligence, mistake, willful misconduct or any misconduct on O'Donnell's part in filing the notice of appeal or in marking it filed June 8, 1906, or in certifying to the supplemental transcript. They deny that Davidson was compelled to pay the amount of the judgment to

Bailey; deny that Davidson had a good, valid, subsisting defense, or any defense, to Bailey's cause of action; and generally deny that by reason of any act or acts on the part of O'Donnell, Davidson has been damaged in any sum whatever. On these pleadings the cause came on for trial, which resulted in a verdict in favor of the plaintiff, and from the judgment entered on the verdict and from an order denying them a new trial, the defendants appealed.

During the course of the trial, after the plaintiff had rested and while the defendants were presenting their defense, they offered in evidence certain minute entries of the district court in the case of *Bailey v. Davidson* while the cause was pending in that court and before Bailey had filed his motion to dismiss the appeal. One of these minute entries, dated July 6, 1908, reads as follows: "In this cause, upon application of counsel for plaintiff, it is ordered that plaintiff have and be granted leave to file and serve a supplemental complaint herein." Upon objection by counsel for this plaintiff all of that record evidence, including the minute entry above, was excluded, and the ruling of the trial court is assigned as error. The objection to the evidence was that it relates to allegations of the answer which had been stricken out, and was therefore immaterial.

It was necessary for plaintiff to allege, as he did, that he was compelled to pay to Bailey the amount of the judgment. This allegation was denied, and we are satisfied that upon the issue thus made, the offered evidence was admissible. If this minute entry had been received in evidence, it would have tended to show that notwithstanding any wrongful act on the part of O'Donnell, Davidson's appeal had become effective; for while the Code provides for the filing and service of a notice of appeal, there cannot be any doubt but that service of the notice may be waived altogether. The object to be accomplished by serving a notice of appeal is to apprise the respondent that the appellant has removed the cause to a higher court, and to give the respondent an opportunity to appear and protect himself in the appellate court. Assuming, in this instance, that David-

son filed his notice of appeal but never served it upon Bailey or his attorney at all, still, if Bailey went into the district court and asked for and was granted leave to file a supplemental complaint, would any court then listen to him to say that he had not been served with the notice of appeal or that service of the notice had not been made as required by law? The plainest dictates of common sense would say at once that he had waived the service by his general appearance in the district court. (*State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098.)

In 2 Spelling on New Trial and Appellate Practice, section 543, the general rule is stated as follows: "But the service of the notice of appeal is so far a provision for the personal benefit of a party that it may be waived." In 2 Cyc. 875, the same rule is stated as follows: "Appeal process, or defects therein, and service thereof, or irregularities in the service, may be waived by a voluntary appearance of the appellee or defendant in error in the appellate court, or by his doing some act which amounts to an appearance." In 2 Encyclopedia of Pleading and Practice, 231, it is said: "An adverse party upon whom notice of appeal has not been served as the statute requires waives the defect when he appears generally in the appellate court." In Elliott on Appellate Procedure, section 175, the same rule is stated in the following language: "Time is an essential element in the service of process. A notice not given in season is bad when directly and properly assailed. But where there is an appearance and no objection, defects are waived. It is not essential to constitute a waiver that there should be a formal or regular appearance, for waiver of notice may be implied from an indirect or informal appearance, as, for instance, by filing a brief upon the merits." In *Matthews v. Superior Court*, 70 Cal. 527, 11 Pac. 665, the subject was before the supreme court of California and disposed of as follows: "The exercise of jurisdiction by an appellate court, in a case where there has been no service of notice of appeal, is ineffectual and void (citing cases); but the party upon whom the law requires notice to be served may voluntarily appear, and submit

himself to the jurisdiction of the court. If he appears, his appearance is a waiver or cure of the want of notice." The rule is founded in reason and is supported by the authorities generally. (*Holden v. Haserodt*, 2 S. D. 220, 49 N. W. 97; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291, 56 N. E. 665, 48 L. R. A. 41; *Valley Lumber Co. v. Struck*, 146 Cal. 266, 80 Pac. 405; 7 Current Law, 156.) The function to be performed by the notice of appeal is the same as that of a summons in a civil action, and it will not be even suggested at this time that a general appearance by the defendant does not waive service of summons.

If, then, Bailey went into the district court and obtained leave to file a supplemental complaint, he appeared generally in that court, and thereby waived any defect in the service of the notice of appeal. Since this offered evidence tends to show such general appearance, it was material in behalf of the defendants, and in its exclusion the court committed reversible error; for if the defendants could have shown a waiver of any defect of service of the notice of appeal, it would have amounted to a complete exoneration of O'Donnell, for, no matter what wrongful acts, if any, he may have committed, if the district court, notwithstanding them, fully acquired jurisdiction of the appeal, then it cannot be said that O'Donnell's acts were a proximate cause, or any cause, of the dismissal of the appeal; and if his acts were not a proximate cause of the dismissal, then it was not because of his acts that Davidson was compelled to pay the Bailey judgment, if in fact he was compelled to pay it.

It does not appear to be necessary at this time to consider any other question presented upon this appeal; but for the error in excluding the offered evidence, the judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied June 23, 1910.

KNUCKEY, RESPONDENT, v. BUTTE ELECTRIC RAILWAY
CO. ET AL., APPELLANTS.

(No. 2,831.)

(Submitted May 20, 1910. Decided May 28, 1910.)

[109 Pac. 979.]

*Street Railways—Passengers—Personal Injuries—Master and
Servant—Joinder of Parties Defendant—Complaint—Suffi-
ciency—Failure of Proof.*

**Master and Servant—Passengers—Personal Injuries—Parties Defendant—
Joinder.**

1. *Held*, that a master and his servant may properly be joined as defendants in an action for personal injuries, directly caused by the negligence of the servant, for which negligent act the master is responsible under the doctrine of *respondet superior*.

Personal Injuries—Street Railways—Passengers—Complaint—Sufficiency.

2. The complaint in an action against a street railway company to recover damages for injuries sustained in being thrown from the steps of the car while waiting to alight at his destination, and after the car had stopped but before plaintiff had time to step off, *held* sufficient to state a cause of action.

Same—Complaint—Evidence—Failure of Proof.

3. Plaintiff alleged in his complaint against a street railway company that while he was at his destination and in the act of stepping off defendant's car (thus implying that the car had stopped), it was negligently started with a sudden jerk, causing him to be thrown to the ground and injured. The testimony showed that while the speed of the car had slackened, it did not stop but, having run by his destination at a slow rate of speed, suddenly accelerated its speed, causing plaintiff to fall. *Held*, that there was such a variance as amounted to a failure of proof.

Same—Passengers—Alighting from Car While in Motion—Responsibility of Carrier.

4. Where a passenger alleges in his pleadings, or shows by his proof, that he alighted from defendant's car while the same was in motion, he must also show his reason for so doing, *i. e.*, that the proximate cause of his injury, was negligence on the part of defendant. The mere fact that he was injured is not alone sufficient to charge the carrier with responsibility therefor, unless the injury is caused by some agency for which the carrier is responsible.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Frank Knuckey against the Butte Electric Railway Company and another. From a judgment in favor of plaintiff, defendants appeal. Reversed and remanded.

Mr. W. M. Bickford, Mr. George F. Shelton, Mr. Thomas J. Walker, and Mr. Charles A. Ruggles submitted a brief in behalf of Appellants. Oral argument by *Messrs. Walker and Ruggles*.

It is improper to join a master and servant as codefendants in a negligence case, where the master's liability rests solely upon the doctrine of *respondeat superior*, and not upon the participation by the master in the wrongful acts or omissions complained of. (See *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Hewett v. Swift*, 3 Allen, 420; *Bailey v. Bussing*, 37 Conn. 349; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503.) The appellate court of Illinois, in the case of *Johnson v. Magnuson*, 68 Ill. App. 448, held that under the Practice Act of that state, the old common-law distinctions having been abolished, the master and servant could be joined in an action of tort, where the master's liability was simply due to the relationship existing between him and the servant, and not to any act of the master. The same court, in a later case—*Berghoff Brewing Co. v. Przbylski*, 82 Ill. App. 361—however, overruled the case of *Johnson v. Magnuson*. (See, also, *Page v. Parker*, 40 N. H. 47; *Warax v. Cincinnati etc. Ry. Co.*, 72 Fed. 642.)

A plaintiff in an action of this character, who shows by his own allegation, or by proof, that he attempted to alight from a car at a point not in any wise indicated as a usual stopping place without in any way notifying the persons in charge of the operation of the car of his desire or intention to alight, and who fails to show that such persons had any knowledge, either actual or constructive, of his desire to get off at that point, or of his actually attempting to get off at such point, shows that, as a matter of law, he is not entitled to recover damages for injuries sustained while in the act of so getting off, and this whether the car was in motion or not. (*Spaulding v. Quincy & Boston Ry. Co.*, 184 Mass. 470, 69 N. E. 217; *White v. West End Ry. Co.*, 165 Mass. 522, 43 N. E. 298; *Blakney v. Seattle Electric Co.*, 28 Wash. 607, 68 Pac. 1037; *Chicago etc. Ry. Co.*

v. *Mills*, 91 Ill. 39; *Lee v. Elizabeth etc. Ry. Co.*, 69 N. J. L. 607, 55 Atl. 106; *Robinson v. Helena Light & Ry. Co.*, 38 Mont. 222, 99 Pac. 837.)

The plaintiff was injured while attempting to get off a moving car, going at the rate of from six to eight miles an hour, while he was encumbered with a double-barreled gun and a loaded cartridge belt, his attempt to get off the car being in the middle of a block, and at a point which was not a regular stopping place of the cars. Under these circumstances, the plaintiff was guilty of such negligence as to bar a recovery on his part, even assuming that he gave some notice of his desire to get off. (*Boone v. Oakland Transit Co.*, 139 Cal. 490, 73 Pac. 243; *Jagger v. People's St. R. Co.*, 180 Pa. 436, 36 Atl. 867, 38 L. R. A. 786; *Harmon v. Washington etc. Ry. Co.*, 6 Mackey (D. C.), 57; *Campbell v. Los Angeles Ry. Co.*, 135 Cal. 137, 67 Pac. 50; *Saffer v. Railroad Co.*, 5 N. Y. Supp. 700; *Toledo etc. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, 42 N. E. 477; *Solomon v. Ry. Co.*, 103 N. Y. 437, 57 Am. St. Rep. 760, 9 N. E. 430; *Brown v. R. Co.*, 181 Mass. 365, 63 N. E. 941; *Newlin v. Iowa Central Ry. Co.*, 127 Iowa, 654, 103 N. W. 999; *Burgin v. R. Co.*, 115 N. C. 673, 20 S. E. 473; *Mearns v. Central R. R. Co. of New Jersey*, 139 Fed. 543, 71 C. C. A. 331; *Outen v. North & South St. Ry. Co.*, 94 Ga. 662, 21 S. E. 710; *Calderwood v. North Birmingham Ry. Co.*, 96 Ala. 318, 11 South. 66; *North Chicago Ry. Co. v. Wrixon*, 51 Ill. App. 307.)

The mere fact that the car actually slows down, even after the party has expressed his desire to get off, does not justify a passenger in attempting to alight at a point which is not a regular stopping place, although such regular stopping place has been signaled for by the plaintiff passenger and the conductor has assented to the request. (*Oddy v. West End Ry. Co.*, 178 Mass. 341, 86 Am. St. Rep. 481, 59 N. E. 1026; *Armstrong v. Metropolitan St. Ry. Co.*, 55 N. Y. Supp. 498.)

Where a plaintiff attempts to alight from a car of a street railway company, without giving any notice whatever of his

intention so to do to the persons in charge of the car, he cannot properly charge the company with negligence, if he happens to be thrown from the car by the car's suddenly starting backward or forward. His desire and intention to get off and his being in a position of peril must be known somehow to the conductor or the motorman before they can be charged with any negligence in operating the car without regard to his presence. (*Lee v. Elizabeth etc. Ry. Co.*, 69 N. J. L. 607, 55 Atl. 106; *White v. West End Ry. Co.*, 165 Mass. 522, 43 N. E. 298; *Chicago etc. Ry. Co. v. Mills*, 91 Ill. 39; *Spaulding v. Quincy & Boston R. Co.*, 184 Mass. 470, 69 N. E. 217; *Blackney v. Seattle Elec. Co.*, 28 Wash. 607, 68 Pac. 1037.)

In behalf of Respondent there was a brief by *Messrs. Maury & Templeman*, and *Mr. J. O. Davies*, and oral argument by *Mr. H. L. Maury*.

In the following states in which the question relative to misjoinder of the master and servant in a negligence case such as this has arisen, it has been decided adversely to appellants' contention: New York, Indiana, Texas, Kansas, Minnesota, Georgia, Kentucky, New Jersey, South Carolina, Washington, Tennessee, Wisconsin and Alabama. The cases *pro* and *con* are carefully collated in a note to *Mayberry v. N. P. Ry. Co.* (Minn.), 10 Am. & Eng. Ann. Cas. 756, and for additional authorities, holding in respondent's favor, see *Southern Ry. Co. v. Arnold* (Ala.), 50 South. 293; *Hinds v. Harbou*, 58 Ind. 121; *Shearer v. Evans*, 89 Ind. 400; *Ward v. Pullman Car Co.* (Ky.), 114 S. W. 754; *Swain v. Tennessee Copper Co.*, 111 Tenn. 438, 78 S. W. 93; *Jones v. Duck Town Sulphur, Copper & I. Co.*, 109 Tenn. 375, 71 S. W. 821; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 48 Am. St. Rep. 911, 63 N. W. 93.

Plaintiff having alleged that the defendants undertook and agreed to transport him to and deliver him safely at his desired destination, which, in another part of the complaint, he alleged to be at the intersection of Warren and East Galena streets, it would be immaterial whether or not the place was a

usual and customary place for the defendant to stop its cars. They would be bound to transport him to the place which they undertook and agreed to do, whether it was a usual and customary place or not, and it would be unnecessary for plaintiff to inform the defendants, or either of them, that he wished or desired to get off at a place where he says they undertook and agreed to deliver him. He would have a right to assume that they would let him off at the place where they undertook and agreed to deliver him.

Again, we contend that the complaint by every reasonable intendment which should be given to the complaint at this stage of the proceedings, does allege that the car stopped at the intersection of East Galena and Warren streets, and that the injuries caused plaintiff were due to the fact that the defendants, while the car was at said place, suddenly and violently started said car and put it in motion, without allowing plaintiff sufficient time to get off. (*Peterson v. Metropolitan Ry. Co.*, 211 Mo. 498, 111 S. W. 37; *Galveston H. & S. A. Ry. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204.)

In our opinion, the complaint would have stated a cause of action if it simply had alleged that while the plaintiff was riding upon the platform and steps of the said car he was thrown from the car, through the want of care of the defendants, by reason of the defendants' carelessly and negligently starting and putting in motion the said car, with a sudden and violent start. (*Scott v. Bergen Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060; *Cons. Traction Co. v. Thalheimer*, 59 N. J. L. 474, 37 Atl. 132; *Birmingham Ry. Co. v. Haggard*, 155 Ala. 343, 46 South. 519; *Southern Ry. Co. v. Burgess*, 143 Ala. 364, 42 South. 35; *Birmingham Ry. Co. v. Wright*, 153 Ala. 99, 44 South. 1037; *Birmingham v. McGinty*, 158 Ala. 410, 48 South. 491.)

MR. JUSTICE SMITH delivered the opinion of the court.

This is an action to recover damages on account of personal injuries, alleged to have been sustained by plaintiff while a passenger on one of the street-cars of the defendant Butte Elec-

tric Railway Company, in Butte, Silver Bow county. The complaint, after alleging that the destination of the plaintiff, on the night he was injured, was the intersection of Warren and East Galena streets, alleges: "That while plaintiff was such passenger, and at his destination, the place aforesaid, when in the act of getting out of and off from said car and being still thereon, to-wit, on the platform and steps thereof, the said car was, through want of care of the said defendants, carelessly and negligently started and put in motion, with a sudden and violent start and without allowing plaintiff sufficient time to get off, and in consequence thereof, and in consequence of the negligence and carelessness of the defendants in running and conducting said car, the said plaintiff was suddenly and violently thrown to the ground," etc.

The plaintiff testified, in substance: That as the car approached the intersection of Warren and East Galena streets, he arose from his seat near the front door and went to the door, which he found was fastened on the outside. The motorman unfastened it and let him out upon the platform. As he passed out, he said "Warren," in an ordinary tone of voice. The car slowed down near the crossing, to a speed of about four or five miles per hour. Plaintiff stepped down one step, with his hand grasping the iron rail. The car did not stop at Warren street, but continued to run at the slow rate of speed for about 100 feet, when suddenly it was violently jerked and started forward so swiftly that plaintiff lost his hold, fell to the ground and was injured. Other passengers testified that there was a violent jerk of the car.

At the close of plaintiff's case, the defendant Rundblad filed a motion to dismiss the action as to him, for the reason, among others, that there was a fatal variance between the proof introduced by plaintiff and the allegations of his complaint. The defendant Butte Electric Railway Company moved for a nonsuit for the same reasons. Both motions were overruled. At the close of all the testimony, defendants moved the court to peremptorily instruct the jury to return a verdict in their favor,

for the same reasons urged in support of the previous motions. This the court refused to do. The trial resulted in a verdict for the plaintiff in the sum of \$25,000. This amount was reduced to \$11,000 by the trial court as the condition of an order denying a new trial. Plaintiff accepted the condition. From the judgment and the latter order, defendants have appealed.

1. It is contended by counsel for the appellants that there is a misjoinder of parties defendant, for the reason that there is no joint liability of the master and the servant; that the liability of the master rests upon an entirely different basis from that of the servant, in that the liability of the latter is based directly upon his own negligent act and its effect upon the plaintiff, whereas the liability of the master results from the application of the doctrine of *respondeat superior*. The question is hardly an open one in this state. We have the modern reformed procedure, and it has been customary to pursue the practice adopted by the plaintiff. In *Golden v. Northern Pacific Ry. Co.*, 39 Mont. 435, 104 Pac. 549, the matter was practically decided adversely to the appellants' contention. Now that the point has been directly raised, we see no reason for changing our views. The supreme court of Washington has held to the same effect in *Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949, as has likewise the supreme court of Minnesota in *Mayberry v. Northern Pacific Ry. Co.*, 100 Minn. 79, 110 N. W. 356, 12 L. R. A., n. s., 675, 10 Am. & Eng. Ann. Cas. 754, and note. (See, also, section 6486, Revised Codes.)

2. It is contended that the complaint does not state facts sufficient to constitute a cause of action, for the reasons: (1) That there is no allegation to the effect that the defendants had any knowledge or notice, either actual or constructive, that the plaintiff intended to get down on the steps of the front platform of the car and to alight from the same; and (2) that the complaint does not show the place where the plaintiff was in the act of getting out of and off from the car was a usual place for the defendant company to stop its cars so as to allow passengers to alight or go aboard. This specification of error well

illustrates the infirmity in plaintiff's case. It seems manifest that it either has some merit, or the court must hold, in response to another specification of error, that there was a fatal variance between the allegations of the complaint and the proof offered in support of those allegations. After a careful study of the language employed in this pleading, we are of opinion that it states facts sufficient to constitute a cause of action. It is alleged that plaintiff's destination was Warren street; that the defendants understood and agreed to deliver him there; that "while plaintiff * * * was at his destination, * * * when in the act of getting * * * off from said car, * * * the car was * * * started and put in motion * * * without allowing plaintiff sufficient time to get off, and in consequence thereof * * * plaintiff was * * * thrown to the ground and sustained great injuries. * * * " We are unable to perceive how there can be a difference of opinion concerning the meaning of this language. It means that the car stopped at Warren street, and that while plaintiff was in the act of alighting, and before he had been given sufficient time for that purpose, it was suddenly started again, by reason of which he was thrown to the ground. This being true, the question whether defendants had notice that the particular passenger desired to alight becomes immaterial, so far as this case is concerned. To "start," as the word was employed in the pleading, means to cause to move; to set going; to give an initial impulse, as to start a train; to cause to begin to move; the beginning, as of a journey or course of action; initial impulse or movement; first motion from a place—opposed to finish. (Webster's New International Dictionary, ed. 1910.) It does not mean that the movement of the car was accelerated. The allegation is that the car stopped at Warren street; otherwise it could not have started from that point. The averment that the car was put in motion bears out this construction; indeed, it is concurred in by respondent's counsel.

3. In the view we have taken of other matters presented by the appeal, it becomes unnecessary to consider whether the court

erred in refusing to postpone the trial on account of the absence of certain witnesses on the part of the defendants.

4. It is contended that, aside from the other questions involved, the plaintiff failed to make out a case sufficient to go to the jury. We cannot agree with counsel in this. We think the jury was justified in concluding from plaintiff's testimony that he arose from his seat as the car approached Warren street, went out on the platform, and mentioned the name of the street to the motorman. This is the customary manner of signifying a desire that a car be stopped. The speed of the car was slackened and reduced to about four or five miles per hour, and he, under the impression that it was about to stop at the crossing, stepped down from the platform to the first step of the car, preparatory to alighting. The car did not stop, but continued at a slow rate of speed for some distance beyond the crossing. When suddenly, while he was in the same position and unable to determine whether it would stop in the immediate vicinity, its speed was increased with a violent jerk, and he was thrown off and injured. We think he established a *prima facie* case of negligence.

5. But it is contended by the appellants "plaintiff did not make the slightest attempt to prove the cause of action stated in the complaint, to-wit, a cause of action based upon his being injured while he was getting off a car which had stopped at Warren street and which was started and put in motion while he was in the act of getting off." This contention must be sustained. There was an entire failure to prove the cause of action pleaded. The motion for a nonsuit should have been granted on that ground. Respondent cites the case of *Feagin v. Gulf, C. & S. F. Ry. Co.*, 45 Tex. Civ. App. 251, 100 S. W. 346, wherein the court said: "The *gravamen* of the charge upon which negligence was based was the sudden and violent jerking of the train before plaintiff had time to reach her seat, and it was entirely immaterial upon the issue of the alleged negligence of the defendant whether the train was absolutely stationary at the time she boarded it, or, as testified by her, 'was in motion of movement.' It would be just as negligent to suddenly and

violently increase the speed of a train which had not entirely stopped, but upon which a passenger had been received, without giving such passenger time to reach a seat, as it would be to so suddenly start a train which had come to a full stop for the purpose of receiving such passenger." That case, however, is clearly distinguishable from the instant one. There defendant's alleged negligence occurred after plaintiff got upon the train. Here the electric railway company had a right to accelerate the speed of its car between stops, provided it did so in a reasonably careful manner; but it would have no right whatsoever to start a stationary car while a passenger was in the act of alighting. The defense to be interposed would be altogether different. Not only that, but the allegations of the complaint gave the defendants no notice that it would be claimed that the plaintiff was thrown from the car at a point 100 feet east of Warren street, by a violent jerk caused by a sudden increase of speed, while he was standing still on the steps of the car. He alleged that he was in the act of alighting, and the defendants might well have supposed that if they could prove that the car was in motion at the time, between cross streets, they might thereby exonerate themselves, either as a matter of law or in the estimation of the jury. And the question of notice to or knowledge of the motorman and conductor of plaintiff's position might become material if the speed of the car was merely increased; whereas, if the car had stopped at a customary and usual place, either on his signal or without signal, the servants of the company were bound to anticipate that some one might be alighting, and could not thereafter rightfully put the car in motion without giving a reasonable time to alight to all who desired to do so (*Ferry v. Manhattan Ry. Co.*, 118 N. Y. 497, 23 N. E. 822), and would not be justified in moving the car at all while a passenger was in the act of getting off under the circumstances alleged in the complaint. If the plaintiff had been injured in the manner set forth in his complaint—that is, after the car had been stopped—it would make no difference whether or not he had theretofore indicated to the motorman the fact that he desired to alight at Warren

street. On the other hand, if the car had not stopped, it became immaterial to inquire whether he had requested that it be stopped at that point. (*Sims v. Metropolitan St. Ry. Co.*, 65 App. Div. 270, 72 N. Y. Supp. 835.) In the latter case the question whether he spoke the word "Warren" to the motor-man would throw considerable light upon the truth of his implied assertion that he expected the car would stop, and also upon the testimony of a witness who said that the car had passed Warren street before he started for the platform.

Another important question involved in the case, as shown by the testimony, is whether plaintiff caused his own injury by negligently getting off a moving car—a question of fact for the jury—whereas, in the case as pleaded, he had a right to get off where and when he did, and would probably have been guilty of no negligence in so doing. It is true that the plaintiff was a passenger; but when he either alleges in his pleadings, or shows by his proof, that he alighted from a car while the same was in motion, he must also show his reason for so doing. In other words, he must show the proximate cause of his injury to have been some negligence on the part of the defendant. The mere fact that a passenger is injured while alighting from a car is not alone sufficient to charge a railway company with responsibility therefor. (See *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Holbrook v. Utica etc. R. R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502.) As was said by the New York court of appeals, in the last case cited: "It is incorrect to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to plaintiff. The presumption arises from the cause of the injury or from other circumstances attending it, and not from the injury itself." The mere fact of an injury suffered by a passenger while on his journey, without any evidence connecting the carrier with its cause, is not sufficient to raise a presumption of negligence on the part of the carrier. (2 Shearman & Redfield on Negligence, 5th ed., sec. 516. See, also, *Mitchell v. Southern Pac. R. R. Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130; *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 10 Am. St. Rep. 601, 17 Atl. 14, 2

L. R. A. 820; *Budd v. United Carriage Co.*, 25 Or. 314, 35 Pac. 600, 27 L. R. A. 279.) Where, however, the injury is caused by some thing or agency for which the carrier is responsible, as, for instance, the condition of its track or roadbed, proof of that fact is, as a general rule, sufficient to raise a presumption of negligence. Proof of the derailment of a train is sufficient. (*Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988.)

We conclude, therefore, that it was incumbent upon the plaintiff to prove some negligent act of the defendants which resulted in his injury, and that such negligent act must be the one, or one of those, set forth in the complaint. Also, that the cause of action proven is not set forth in the complaint in any of its essential particulars, and the cause of action pleaded is unproved in its general scope and meaning, resulting in a failure of proof. (See section 6587, Revised Codes; *Forsell v. Pittsburgh & Mont. C. Co.*, 38 Mont. 403, 100 Pac. 218; *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 107 Pac. 416. See, also, *Cody v. Duluth St. Ry. Co.*, 94 Minn. 74, 102 N. W. 201, 397.)

Respondent's brief is prefaced by an objection to the consideration by this court of the order overruling appellants' motion for a new trial. The objection is based upon the contention that the district court lost jurisdiction to pass upon the motion for a new trial because of the fact that the bill of exceptions was not served and filed within the time allowed by an order of the court. In view of what has been said by this court in *Hill v. McKay*, 36 Mont. 440, 93 Pac. 345, and *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, we are of opinion that the objection is not tenable.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 22, 1910.

WAHLE ET AL., RESPONDENTS, v. GREAT NORTHERN RAILWAY CO., APPELLANT.

(No. 2,828.)

(Submitted May 18, 1910. Decided May 28, 1910.)

[109 Pac. 713.]

Carriers—Railroads—Carriage of Livestock—Wrongful Acceptance for Transportation—Liability of Carrier—Damages—Evidence—Sufficiency.

Complaint—Ambiguity—Special Demurrer.

1. Ambiguity in a complaint can be reached by special demurrer only.
Same—Sufficiency.

2. Under the rule that if a complaint states facts sufficient to warrant a recovery upon any theory, it must be sustained, a complaint against a railway company to recover damages for injury to livestock wrongfully accepted by the carrier for transportation when it knew, or should have known, that delivery at the place of destination was impossible under the then existing conditions of its road, though rendered ambiguous by unnecessary allegations specifying the elements of damage, *held* sufficient in the absence of a special demurrer.

Railroads—Carriage of Livestock—Wrongful Acceptance for Transportation—Evidence—Immateriality.

3. In an action against a common carrier for wrongfully accepting livestock for transportation when it had not the facilities to make delivery, a contract offered in evidence, modifying and limiting defendant's ordinary obligations, was properly excluded, since, being unable to perform its contract of carriage and delivery, it was immaterial whether defendant had been relieved by the stipulations of the special agreement from any of the obligations ordinarily incident to a contract of carriage.

Same—Evidence—Proper Exclusion.

4. The special contract referred to in paragraph 3 above was further properly excluded because made between plaintiffs and a carrier other than the one sued, even though such other road was only a division of the defendant named and plaintiffs understood that such was the case.

Same—Carriage of Livestock—Liability of Carrier.

5. If a common carrier accepts property for transportation when he knows, or by the exercise of ordinary care should know, that it is likely to be exposed to injury because he has not suitable facilities for its transportation, he is liable for the resultant loss.

Same—Acceptance for Transportation—Care Required.

6. Plaintiffs, in order to make out a *prima facie* case against defendant carrier, were required only to show that they delivered the livestock to defendant, that it failed to carry the animals to their destination and deliver them, and that loss resulted; the burden was then upon defendant company to prove that at the time of its acceptance of the property for carriage it could not by the exercise of ordinary care have known or anticipated that it could not discharge the obligation thus assumed; and the fact that after acceptance of the animals its road was disabled by unprecedented floods was no defense, if from information at hand it should have foreseen that event.

Same—Damages—Evidence—Sufficiency.

7. Evidence relative to plaintiffs' damages held to furnish some tangible basis for an estimate by the jury, and that while the verdict was for an amount much less than that fixed by the only witness who testified in relation thereto, it should not be set aside on the ground that there was no evidence to support it.

Appeal from District Court, Jefferson County; J. B. Poin-dexter, Judge.

ACTION by Benj. Wahle and another against the Great Northern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Messrs. Veazey & Veazey, and Mr. E. L. Bishop, submitted a brief in behalf of Appellant. Mr. I. P. Veazey, Jr., argued the cause orally.

In behalf of Respondents, there was a brief by Messrs. Kelly & Kelly, and Mr. M. H. Parker, and oral argument by Mr. D. M. Kelly.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiffs to recover damages alleged to have been suffered through the negligence of the defendant railway company in accepting for transportation for them from Boulder, Montana, to Benson, Minnesota, two carloads of horses, the defendant at that time not having the proper means and facilities to transport and deliver them. Omitting the allegations touching the capacity of the defendant and the ownership and condition of the horses, the complaint states:

“(4) That on the third day of June, 1908, the plaintiffs delivered to the defendant corporation as a railway company engaged in the business of common carrier for hire, at the said town of Boulder, county of Jefferson, state of Montana, the said 67 head of horses in good order and condition for transportation by said defendant to the town of Benson, in the state of Minnesota.

“(5) That at the time of the delivery of said horses by the plaintiffs to the defendant for shipment to Benson, Minnesota, the said defendant corporation did not have the proper means and facilities to transport said horses to, and deliver them in, the town of Benson, Minnesota, within a reasonable time and in good condition, all of which said corporation well knew.

“(6) That, by use of reasonable care and diligence by said corporation, its employees, and agents, said company would not have accepted said horses for shipment on the third day of June, 1908, when said defendant corporation, its employees and agents, well knew that it did not have the proper means and facilities to ship said horses to Benson, Minnesota, in a reasonable time and in good condition, or at all.

“(7) That on the third day of June, 1908, with full knowledge of the facts and premises, said defendant corporation, its employees and agents, so negligently and carelessly conducted and so misbehaved in the premises, in its calling as a common carrier, accepted said horses from plaintiffs for shipment, and undertook to transport said horses upon its line of railroad from Boulder, Montana, to Benson, Minnesota, and caused them to be loaded in cars at its station at Boulder, Montana, and taken as far as Clancy, Montana, and on the fifth day of June, 1908, said horses were returned by the defendant corporation to Boulder, Montana, and turned back to these plaintiffs.

“(8) That, after accepting said horses for shipment as aforesaid, the defendant, by reason of its negligence, in not furnishing good and sufficient motive power and cars, and in not properly managing and running its trains, and in not furnishing proper and adequate stockyard facilities for unloading, feeding; and watering said stock, caused the said train carrying said horses to be constantly delayed, suddenly jerked and jolted, whereby one horse was killed, and several badly cut and lacerated, and that said horses were kept on said train and in said yards without a suitable place to feed or water for a period of 47 hours, whereby they were all greatly weakened and emaciated.

“(9) That on account of the said defendant negligently accepting said horses for shipment, as aforesaid, when they did not have the proper means and facilities for shipping, by reason of which they could not transport them to their destination, as agreed upon, and on account of the negligent manner in which said horses were handled and abused while in its possession, and on account of its failure to provide proper cars, yards and feed stations to properly feed and water said horses, while in its possession, said horses greatly depreciated in value, and plaintiffs were compelled to provide feed, pasturage and care for said horses for several weeks, and to expend large sums of money for labor and expenses in loading and unloading and in caring for and finding a sale for same, to the plaintiffs’ damage in the sum of \$500.

“Wherefore, plaintiffs pray judgment,” etc. . . .

The defendant’s general demurrer having been overruled, it answered, admitting its acceptance of the horses, its agreement to transport them as alleged, and that certain of them were injured, but denying all other averments. It pleaded affirmatively that its ordinary duties and obligations as a common carrier had at the time of the delivery of the horses to it, been modified by the terms of a special contract (set out *in haec verba*), executed at the time by it and the plaintiffs. Among the stipulations therein was one to the effect that \$75 should be taken as the value of each of the horses and as fixing the basis of the rate charged for transportation. It was also stipulated that as a condition precedent to the right to recover any damages for loss or injury to the horses, or any of them, plaintiffs should give defendant notice in writing within fifteen days after such loss or injury occurred or after the arrival of the horses at their place of destination. It is alleged that there was a failure by plaintiffs to comply with this stipulation. It is further alleged that the defendant accepted and endeavored to carry the horses to the agreed destination, but that, after the transportation had commenced, an unusual, extraordinary, and unprecedented flood washed away its roadbed,

so that further transportation was impossible, and that the horses were on June 5 returned to plaintiffs at Boulder, the point of shipment. Upon these affirmative matters there was issue by reply. The plaintiffs had verdict and judgment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

1. The first contention is that the court erred in overruling the demurrer. The argument is that, if we consider paragraphs 1 to 7, and part of paragraph 9, of the complaint, we find stated a cause of action for negligence by defendant for receiving and subjecting the horses to useless transportation, when it knew it had not facilities to enable it to make delivery of them at their destination; but that, if we consider paragraphs 1, 2, 3, 7 and 8 and other portions of paragraph 9, we find stated a cause of action for breach of duty by defendant as a common carrier to transport the horses with reasonable speed and due care. Hence, it is said that, since these allegations are contradictory and inconsistent, they mutually destroy each other, with the result that the complaint does not state a cause of action within the rule prescribed by the statute, to-wit, that it shall contain a statement of the facts constituting the cause of action, in ordinary and concise language. (Revised Codes, sec. 6532.)

It is reasonably clear from an inspection of the complaint that the purpose of the pleader was to state a cause of action for a breach of duty by the defendant in accepting the horses for transportation and subjecting them to the damage necessarily incident to having them loaded on its cars and carrying them the distance it did, when it knew, or should have known, that it could not deliver them at their destination. It is conceded by counsel for defendant that it states facts sufficient to warrant a recovery on this theory for all damage which the horses suffered, whether it was aggravated by negligence on the part of the defendant in transporting them to Clancy, or by its omission to provide suitable facilities for unloading and feeding them at that place. If this is so, the defendant is in

no position to object that the complaint goes further and specifies the elements of damage when it was not necessary to do so. The pleading is not a model, but the most that can be said of it is that it is ambiguous. This is a defect which can be reached only by special demurrer. (Revised Codes, sec. 6535.) From this point of view, the allegations are neither contradictory nor inconsistent and the rule, often announced by this court, that if a complaint states facts sufficient to warrant a recovery upon any theory, it will be sustained, applies. (*Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988.)

2. Error is alleged upon the action of the court in excluding evidence of the contract pleaded in the answer, modifying and limiting the ordinary obligations of the defendant as a common carrier. The copy offered in evidence, though substantially the same in other particulars, differed from the contract pleaded in two important particulars. The contract pleaded purports to be between the plaintiffs and defendant. The copy offered purports to be between the plaintiffs and the Montana Central Railway Company. The contract pleaded also contains a stipulation to the effect that any action brought for damages for delay in transportation, or for loss or injury to any of the horses, must be brought, if at all, within three months after such loss or injury occurred, whereas the copy offered contains no such stipulation. Upon the theory that the action was brought for the wrongful acceptance by defendant of the horses for transportation, evidence of the contract was wholly immaterial; for, since it could not carry and deliver them as it undertook to do, it was wholly immaterial whether the defendant was guilty of unnecessary delay in delivering them, or caused loss of or injury to any of them by improper handling during the course of transportation from Boulder to Clancy, or by failing to provide proper facilities for caring for them at the latter place. The contract of carriage contemplated transportation and

delivery. It being impossible for the defendant to perform this contract, it was immaterial whether it had been relieved by the stipulations of the special contract from any of the obligations ordinarily incident to a contract of carriage. But, adopting the theory that the defendant was able at the time it accepted the horses to carry them to their destination and would have done so but for the unprecedented flood, the contract offered was not the one pleaded, and could not be any defense against a recovery for loss caused by delay in the performance of its contract, or for the injury resulting from the negligent handling of the horses or providing for care of them while on the way. The averment of such a contract between plaintiffs and defendant could not be supported by proof of a contract between the plaintiffs and a third party. If, as defendant contends, the Montana Central Railway was only a division of its own railway, and the parties understood when the contract was signed that such was the case, and that plaintiffs understood that they were in fact contracting with the defendant, the designation of it as Montana Central Railway being used merely as a convenient designation of that division, the case is in no wise aided. Under the allegations in the answer, the plaintiffs were required to respond to a contract containing specific stipulations entered into with the defendant, and could not at the trial be held to respond to a contract with any other person, not a party to the action, containing other and different stipulations.

3. Way, one of plaintiffs, testified that the horses had been loaded at Boulder at about 8 o'clock in the evening of June 3; that the train reached Clancy, a distance of twenty-two miles away, about 3 o'clock next morning; that he then ascertained that a horse in one of the cars was down and at once requested the agent to unload the car containing it, so that he could find out what the trouble was; that the agent then informed him that all would have to be unloaded, which, owing to delay on the part of the agent, was not accomplished until about 6 o'clock, or three hours later. The injured horse was afterward killed. The de-

fendant examined the witness Murphy, its assistant superintendent, as to the conditions existing along the line of defendant's railway at the time the horses were accepted for shipment at Boulder. He testified, among other things, that under the conditions as to high water and probable floods as he saw them he was of the opinion that it was consistent with careful and prudent railroading to send trains beyond Clancy on June 3 and during a part of the following day. On cross-examination he was asked and required to answer the following question: "Assuming that this carload of horses got into Clancy on the morning of June 4 some time about 2 or 3 o'clock, and that immediately thereafter the owner of the horses went to the agent of the company at the depot at Clancy and asked him when they were going to get out there, and he told him that he did not know, and that thereafter immediately he told him that one of those cars of horses would have to be unloaded because one of them was down in the car being trampled upon by the others, do you consider it careful and prudent railroading if this horse were left in that car until 6 o'clock that morning?" Answering, he said he did not. Objection was made that the question was improper, in that, being hypothetical, it recited a fact which did not appear from the evidence, *viz.*, that the agent at Clancy knew the condition of the horse. It appears from the testimony of Way that the agent knew of the condition of the horse, and hence the question recited no fact which did not appear from the evidence. Assuming, therefore, that the question was otherwise pertinent and proper, the ruling was correct, because the question was not open to the objection made to it.

4. It is argued that the evidence is insufficient to sustain the verdict in that it appears that if there was any damage to the horses it was only such as is ordinarily incident to the transportation of such animals resulting from being confined in the cars and carried contrary to their natural habits and from unavoidable delay, etc., and in that the statements of the witnesses as to the extent of the damage are not sufficiently definite to justify a finding in any amount. It is also said that there is no evi-

dence that at the time the defendant accepted the horses for transportation it knew that it did not possess ample facilities for carrying them to their destination. It may be conceded that the loss of the horse that was killed and the depreciation in value of the others should be attributed to the cause assigned by the defendant. In that case no recovery could be had if it appeared from the evidence that at the time it accepted them the defendant was in a position to carry them to their destination and used reasonable diligence in that behalf. To avoid delay in delivery, the carrier is held to the exercise of reasonable care only. (Revised Codes, sec. 5355.) A different rule of liability is imposed for loss or injury to the property while it is in his possession. He is liable in that case for loss or injury accruing from any cause whatever, except from some inherent defect, vice, weakness, or spontaneous action of the property itself, or the act of a public enemy, or any "irresistible superhuman cause." (Revised Codes, sec. 5353.) But even these exemptions do not apply if the carrier negligently exposes the property to the cause of the loss. (Revised Codes, sec. 5354.) The result of this latter provision is that acceptance of property by the carrier when he has not suitable facilities for its transportation, or when he knows, or by the exercise of ordinary care should know, that it will be exposed to injury or loss from any of the causes mentioned in the exemptions, he is liable; for, under such circumstances, the loss or injury is to be attributed to his own wrong, just as if he had wrongfully taken the property and converted it in the first place, and the measure of damages is the same. Hence under the application of this rule, which is assumed by the defendant to be correct, it does not matter that the injury complained of was due to the causes assigned by defendant, if it violated its duty in undertaking to carry the horses when it should not have done so. Under the rule recognized generally and followed by this court, in *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642, the defendant was bound to take notice of the signs of approaching danger, and, if they were of such a character as to awaken reasonable apprehension at the

time when the means of avoiding the danger could be availed of—that is, at the time the contract was made and the property accepted—the defendant assumed the risk, if it neglected to avail itself of the information which it had or might have had by the exercise of reasonable diligence. Its only alternative was to refuse to accept, or to accept with the consent of the plaintiffs, after giving them full information as to the conditions. And this brings us to the point when we must inquire what the evidence shows these conditions to have been on June 3, and what knowledge the defendant had of them.

During the month of April a flood caused by the breaking of a dam in the Missouri river had washed away a considerable portion of defendant's track and roadbed between Clancy and Great Falls, over which it must convey all freight shipped to eastern points. This had been restored, but the roadbed was still unsettled and soft and in places unballasted. On June 3, owing to heavy rains then and theretofore prevailing along the line of defendant's road, conditions in many places between Boulder and Great Falls were threatening. The water in the streams was continually rising. During the afternoon of the 3d a small portion of track had been washed out and restored. During the day application had been made to the defendant by the Northern Pacific Railway Company to have the passenger trains of the latter, carrying mail, nine in all, detoured from its main line, which had been washed out in places by high water in other parts of the state, to the main line of the defendant over the line extending from Boulder and Clancy to Helena and Great Falls. During the afternoon of the day, all available locomotives belonging to the defendant had been gathered at Helena, to be used in detouring these trains, and freight trains due to leave Clancy and other places to the south for Great Falls on that evening were all annulled. The transfer of the trains of the Northern Pacific Railway Company began with the early morning of the 4th. There had also been trouble with the telegraph line. At 3 o'clock P. M. a freight train left Great Falls for Helena. This arrived at the latter place on the morning :

of the 4th. The train having on board the plaintiffs' horses was the last freight train started in the direction of Great Falls from any point south of Clancy on the day of the 3d. One passenger train left Clancy late in the evening, and reached Great Falls on the morning of the 4th. Early in the morning of that day, the telegraph line became entirely disabled, and thereafter all passenger trains (the only ones moved) were handled by means of the long-distance telephone. At some time during the day, all trains were annulled and none were moved for some time thereafter, because of the flood which destroyed portions of the roadbed. The chief train-dispatcher of the defendant testified that the agents of the defendant did not usually anticipate trouble in forwarding perishable property, such as horses, until conditions became serious, and that they were not regarded as serious until they were such as to tie up the business of the road entirely.

Under the issues presented by the pleadings, the plaintiffs were required to go no further than to prove that they delivered the horses to defendant; that it failed to carry them to their destination and deliver them; and that there was loss of or injury to some of them. To acquit itself of responsibility, the defendant was required to show that at the time of its acceptance it could not by the exercise of ordinary care have known or anticipated that it could not discharge the obligation thus assumed (*Jones v. Minneapolis & St. Louis R. Co.*, 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Grier v. St. Louis M. B. T. Co.*, 108 Mo. App. 565, 84 S. W. 158), and it does not avail it that, after acceptance, its road was disabled by the intervention of the flood, however unprecedented it may have been, if by the exercise of reasonable diligence it could have anticipated that such would be the case (*Nelson v. Great Northern Ry. Co.*, *supra*).

Under the facts stated, we do not think that we should conclude as a matter of law that the defendant has acquitted itself of responsibility. Of course, if the testimony of the train-dis-

patcher is to be taken as conclusive of the question when a common carrier may or may not accept property for transportation, he would always, without reference to the character of the property, be justified in accepting it until it became impossible to carry it. The adoption of this rule would excuse the carrier entirely from the obligation to take note of facts which would lead a reasonable person to the conclusion that he could not discharge the attendant obligations. Taking into consideration the general condition of the line of defendant's road from the point of shipment to Great Falls, the prevalence of heavy rains along the line by which the streams were much swollen, that the water was constantly rising, that the conditions were threatening, that there had been trouble with the telegraph lines, that the roadbed was in places new and soft because of the rains, that a portion of it had been washed out within a few hours of the time of shipment, that all the available locomotives of the defendant were already held for the detouring of the trains of the Northern Pacific Railway over the portion of the line by which the horses must be carried, if at all, and that this would in any event cause some delay—we are of the opinion that the evidence presented a case for the jury, and that its finding thereon should not be disturbed.

The evidence submitted as to the amount of damage sustained by plaintiffs, apart from the value of the horse which was killed, is not as satisfactory as it might have been. It consists entirely of a statement by one of the plaintiffs, to the effect that two of those returned to him were cut, that they were all bruised and "skinned up" and had lost flesh, so that they were not fit for sale, and that he estimated their depreciation in value at \$10 a head. Nevertheless it furnished some tangible basis for an estimate by the jury; and, while their finding was for an amount much less than that at which the witness fixed it, we do not think the verdict should be set aside on the ground that there is no evidence to support it.

Incidentally the foregoing discussion disposes of all the other material contentions made by counsel. We shall, therefore, not give them special notice.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

BRACEY ET AL., APPELLANTS, v. NORTHWESTERN IMPROVEMENT CO. ET AL., RESPONDENTS.

(No. 2,830.)

(Submitted May 23, 1910. Decided June 6, 1910.)

[109 Pac. 706.]

*Personal Injuries — Negligence — Rescuing Person in Danger—
Recovery Proper, When—Variance—Failure of Proof.*

Personal Injuries—Rescuing Person in Danger—Recovery Proper, When.

1. One who, observing another in peril, voluntarily exposes himself to the same danger to save the latter's life, may recover for any injury sustained in effecting the rescue, from the person by whose negligence the peril was brought about, provided the exposure is not made under such circumstances as to constitute rashness in the judgment of prudent persons.

Same—Variance—Failure of Proof—Nonsuit.

2. The complaint in an action to recover damages for the death of a coal miner who, while attempting to rescue a fellow-workman, was himself overcome by poisonous gases and died from the effect of their inhalation, charged that the death of decedent was due to the accumulation of gases spontaneously generated in unused workings entered by him; the evidence disclosed that the gases from the inhalation of which deceased died were generated by a fire in the mine. *Held*, that there thus appeared between the cause of action alleged and the evidence adduced to establish it such a variance as amounted to a failure of proof, and that a motion for nonsuit was properly granted.

Same—Evidence—Causal Connection.

3. In personal injury cases the evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury.

Appeal from District Court, Carbon County; Frank Henry, Judge.

ACTION by Ernest Bracey and others, by Alice Bracey, their guardian, and by herself in her own right, against the Northwestern Improvement Company and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Messrs. Walsh & Nolan, and *Messrs. Meyer & Wiggenghorn* submitted a brief in behalf of Appellants. *Mr. C. B. Nolan* argued the cause orally.

The principal question presented by the appeal is whether or not the defendant company owed any duty to Bracey, as a rescuer, other than to refrain from wantonly inflicting injury upon him, and this necessarily presents for consideration the duty, if any, which the defendant company owed to Bracey as a volunteer rescuer. We submit that the company, in failing to prevent an entrance into the mine to those engaged in the work of rescue, and without advising as to its death-dealing characteristic, was guilty of the grossest negligence. The principle here invoked has been repeatedly approved by the courts in connection with rescues effected against approaching trains. (See *Pennsylvania Co. v. Lengendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 13 L. R. A. 190; *Corbin v. Philadelphia*, 195 Pa. 461, 78 Am. St. Rep. 825, 45 Atl. 1070, 49 L. R. A. 715; *Gibney, Admx., v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, 33 N. E. 142, 19 L. R. A. 365; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441, 42 Atl. 60, 42 L. R. A. 842; *Whitworth v. Shreveport Belt R. Co.*, 112 La. 363, 36 South. 414, 65 L. R. A. 129; *Henry v. Cleveland, C., C. & St. L. Co.*, 67 Fed. 426.)

The cases generally hold that where a volunteer is injured, before a recovery can be sustained it is necessary to show negligent conduct toward the rescued or the rescuer. Indeed, to authorize a recovery, no negligence whatever need be established toward the rescuer. If the rescued was placed in a perilous position, the rescuer might take the place of the rescued, and assert such rights as the person rescued might be able to assert.

(See *Saylor v. Parsons*, 122 Iowa, 679, 101 Am. St. Rep. 283, 98 N. W. 501, 64 L. R. A. 542; *Donahoe v. Wabash, St. L. & Pac. Ry. Co.*, 83 Mo. 560, 53 Am. Rep. 594.)

Some courts hold that it is only in the case of an effort to save life that the volunteer is protected to the extent which the cases referred to declare. (See *Eckert v. Long Island R. R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721.)

In behalf of Respondents, *Mr. William Wallace, Jr.*, *Mr. John G. Brown*, and *Mr. R. F. Gaines* submitted a brief. *Mr. Gaines* argued the cause orally.

Counsel insist that the rule of law applicable to this case is that where human life is involved, the rescuer is put in the place of the rescued; and, if toward the rescued the employer is derelict, the rescuer may invoke the advantage of such dereliction. This statement, on its face, apparently disregards the necessity for the existence of a duty owing to the rescuer, from the person sought to be held accountable. If this be in fact a rule of law, it must by all be conceded that it is a radical departure from the fundamental principle giving rise to a tort action, *viz.*, a duty owing, and that duty breached. And we feel, therefore, that being confronted with the alternative either of announcing such a rule, or of limiting its seeming effect to cases in which a duty actually was owing toward the rescuer, every court should unhesitatingly incline toward the latter view. As a matter of fact, as we read the cases relied on by appellants, the courts have done just this. For example: In the case of *Pennsylvania Co. v. Langendorf*, the negligence of the railroad company consisted in having no watchman at the crossing and in running its train at an unlawful rate of speed. In *Eckert v. Long Island Ry. Co.*, the court took the view that the railroad company was guilty of negligence in the operation of the train at a high rate of speed in a populous neighborhood and without signals, thus violating a duty it owed to the public generally. The same reason for permitting a recovery (irrespective of the feature of contributory negligence) is present in each of these cases, *viz.*, a

duty owing to the public and including the injured person. These two cases are quoted approvingly in *Corbin v. Philadelphia*, 195 Pa. 461, 78 Am. St. Rep. 825, 45 Atl. 1070, 49 L. R. A. 715; and in that action it was a duty owing to the public that had been breached, and a foundation thus furnished for a recovery.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by Alice Bracey in her own right, as the widow and heir of J. E. Bracey, deceased, and as guardian of her minor children, for damages for the death of said Bracey, which it is alleged was caused by the negligence of defendants. The death of Bracey was caused by the inhalation of poisonous gases during an attempt by him to rescue miners in the employ of the defendant company, in its coal mine at Red Lodge, in Carbon county, who had themselves been overcome by inhaling such gases while engaged in an effort to extinguish fire then burning in the mine.

The complaint is very long and somewhat indefinite in some of its allegations; but these may be epitomized as follows: The defendant Pettigrew was the superintendent and general manager of the defendant company and had full charge of its business operations. On and prior to June 7, 1906, there were in the mine gases, deadly and explosive. In order to expel them, the defendant company resorted to ventilation by means of electric fans, which drove currents of air into and through the passageways and out through other openings, thus expelling the gases, or, by reverse movement, drew them out by currents produced by suction, thus allowing fresh air to be forced in through other openings. In some of the passageways there were obstructions, created by debris which was permitted to accumulate therein from falls of rock and earth. These obstructed the free passage of air currents. There were unused workings, from which the coal had been extracted. In these, gases accumulated from time to time, and, escaping therefrom when the fans were

not in operation, accumulated in the passageways. On and prior to June 7 a fire had for some days been burning in the mine. On June 6 one of the ventilating fans had been stopped, and for this reason gases accumulated in the passageways through which men going in to subdue the fire must pass. This fan was started on the morning of the 7th, but had not been running a sufficient time to clear the passageways of the gases. The defendants did not examine these to ascertain their condition. Several miners were sent in by the direction of defendant Pettigrew to subdue the fire, without being informed, however, of the presence of these gases, and, being overcome by them, were in peril of their lives. Information of this condition was brought to the knowledge of defendants and was circulated in the vicinity of the mine, and the defendants knew that rescue parties were likely to go in to effect a rescue. The deceased, Bracey, did not know of the conditions prevailing. At the request of the defendants, and by reason of the information gained through persons in the vicinity, Bracey entered the mine to aid in the rescue. After stating these facts, the complaint proceeds: "That the defendants, wholly disregarding of their duty in the premises, negligently failed to inform and advise the said J. E. Bracey, so entering said mine in the manner hereinabove set forth and under the circumstances therein stated, and for the purpose specified, as to the existence of the poisonous gases that had accumulated in said mine and the workings thereof, and that were then existing through the negligent acts and conduct of the defendants, as above set forth, and negligently failed to advise the said J. E. Bracey of the lack of ventilation then and there existing as above set forth; and the said J. E. Bracey, then and there ignorant of the lack of ventilation, and then and there suspecting and believing that the only dangers and risks to which he was then exposing himself in the work of rescue, aforesaid, were the dangers and risks which arose from the gases then being created and existing on account of the prevalence of the fire in said mine, hereinbefore referred to, on the date named entered said mine and the workings thereof for the purpose of rescuing

the said named persons therein, and the said J. E. Bracey so entering said mine and the portions thereof where said work of rescue was to be performed by him, as aforesaid, and so engaged in said work, was overcome by the gases so negligently permitted to accumulate, as aforesaid, in consequence of which, on the day named, he died in said mines; and plaintiffs further aver, in that connection, that the gases then and there causing his death were gases other than those generated and developed by said fire and of whose existence he was then and there conscious."

The answer denies all of the allegations of the complaint charging the defendants with the acts and omissions constituting the negligence alleged. It alleges that the deceased entered the mine as a volunteer, and that his death was due to his own contributing fault and negligence. At the close of plaintiff's evidence, the defendants moved the court to direct a verdict in their favor, on several grounds, among others, in substance, the following: For that while it is alleged in the complaint that the death of Bracey was due to the inhalation of gases other than those generated by the fire, of which he had knowledge, the evidence shows conclusively that it was caused by gases generated directly by the fire. The motion was sustained, and judgment entered accordingly. The appeal is from the judgment.

The only question submitted for decision is whether the trial court properly withdrew the case from the jury. Recovery is sought upon the theory that the defendants are chargeable with the death of Bracey, by requesting or permitting him to enter the mine for the purpose of rescuing the imperiled miners, without informing him of the dangerous conditions known or which should have been known to them to exist therein, and thus exposing him to a peril of which he had no knowledge. It will be noticed that the existence of the fire is not attributed to any negligence or omission of duty by the defendants; nor is it alleged that gases generated by it were permitted to accumulate. It is alleged that the peril of the miners was due to the accumulation of gases spontaneously generated in the unused workings,

and that the accumulation of these in the passageways which he entered was the cause of Bracey's death. Plaintiff's right of recovery must, therefore, be sustained or denied upon the showing made by the evidence on this point.

The rule is recognized generally that one who, observing another in peril, voluntarily exposes himself to the same danger in order to protect him or save his life, may recover for any injury sustained in effecting the rescue, against the person through whose negligence the perilous condition has been brought about, provided the exposure is not made under such circumstances as to constitute rashness in the judgment of prudent persons. In Mr. Thompson's work on Negligence, we find the rule stated as follows: "One who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting the person of another, may recover for the consequent injuries which he receives, from the persons whose negligence or other wrong caused the injury to himself and the danger to the person whom he sought to rescue." (Section 199.) The rule rests upon the principle that it is commendable to save life, and, though a person attempting to save it voluntarily exposes himself to danger, the law will not readily impute to him responsibility for an injury received while doing so. In such cases the incurring of the danger is not *per se* negligence, and the question whether there was contributory negligence is ordinarily to be answered by the jury upon proof of the circumstances surrounding the attempt to rescue—such as the alarm, excitement, and confusion usually present, and the uncertainty as to the means to be employed, the promptness required, and the liability to err in the exercise of judgment as to the best course to pursue—and great latitude of judgment must be allowed to one who is impelled by the dictates of humanity to decide and act in the face of emergencies. This is true in a case where an effort is made to rescue a person discovered upon the track in front of a rapidly moving train. (*Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 29 Am. St. Rep. 553, 28 N. E. 172, 13 L. R. A. 190.) In this case the plaintiff was injured while attempting to rescue.

a child which he discovered in front of a train approaching at an unlawful rate of speed, at a public crossing which had been left unguarded by the defendant company. The court said: "The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing and the unlawful rate of speed at which the train was running toward it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances, it would be unreasonable to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether, if the danger was imminent. The attendant circumstances must be regarded. The alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done—suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is supported by neither principle nor authority."

Eckert v. Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721, was a similar case, and in declaring the rule of law applicable the court said: "Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without.

serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt to do so, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." (See, also, *Becker v. Louisville & Nashville R. R. Co.*, 110 Ky. 474, 96 Am. St. Rep. 459, 61 S. W. 997, 53 L. R. A. 267; *Donahoe v. Wabash, St. L. & Pac. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Whitworth v. Shreveport Belt Ry. Co.*, 112 La. 363, 36 South. 414, 65 L. R. A. 129; *Corbin v. Philadelphia*, 195 Pa. 461, 78 Am. St. Rep. 825, 45 Atl. 1070, 49 L. R. A. 715; *Maryland Steel Co. v. Marney*, 88 Md. 482, 71 Am. St. Rep. 441, 42 Atl. 60, 42 L. R. A. 842; *Saylor v. Parsons*, 122 Iowa, 679, 101 Am. St. Rep. 283, 98 N. W. 500, 64 L. R. A. 542; *Gibney, Admx., v. State*, 137 N. Y. 1, 33 Am. St. Rep. 690, 33 N. E. 142, 19 L. R. A. 365; Wharton's Law of Negligence, sec. 314.)

In *Corbin v. Philadelphia, supra*, the defendant had left in one of its streets an excavation, made in an endeavor to find an old sewer. The work had been abandoned because gas had accumulated in the excavation in such quantity as to make it unsafe to continue it. It was near a vacant lot, where boys were in the habit of playing ball. No warning had been given that there was gas in it. A few days after it was abandoned, a ball was knocked into it, and a boy went to get it. He was overcome by gas and fell to the bottom. Plaintiff's son, observing his condition, went to his rescue and was himself overcome and died. The supreme court held that it was a question for the jury whether the city had been guilty of negligence, and also whether the deceased was justified in attempting the rescue.

In all cases, negligence toward the person rescued or the person making the rescue, after the attempt has begun, is essential

to recovery. (*Saylor v. Parsons, Donahoe v. Wabash, St. L. & Pac. Ry. Co., supra.*) Nevertheless, the presumption that the rescuer is impelled by the dictates of humanity is of itself sufficient to send the case to the jury, unless it is apparent that, when he encountered the danger, he ought, as a prudent person under the same circumstances, to have known that he could not escape injury or death. The same presumption applies in an action upon an accident insurance policy which contains a stipulation against liability for injuries resulting to the insured from voluntary exposure to unnecessary danger. (*Da Rin, Admr., v. Casualty Co. of America, ante*, p. 175, 108 Pac. 649.)

As has already been said, the charge is that the defendants negligently exposed Bracey to a danger of which he had no knowledge, to-wit, permitted or requested him to go to the rescue thinking that the miners had been overcome by gases generated by the fire, and that he would expose himself to the danger of encountering these only; whereas they knew, or should have known, that he would on his way to them encounter peril from the spontaneous gases which had accumulated in the passageways from the abandoned workings. The inquiry here, therefore, is not whether the defendants were guilty in exposing the deceased to this danger, within the rule declared by the authorities cited, but whether the cause of his death was that alleged; that is, "gases other than those generated and developed by the fire and of the existence of which he was then and there conscious." It may be conceded that they were guilty of gross negligence, both in sending the miners in to subdue the fire without ascertaining what the conditions were, and afterward in permitting the rescuers to enter in ignorance of them.

It is somewhat difficult to ascertain from the statements of the witnesses a clear understanding of the relations to each other of the various portions of the mine, and the method adopted to secure ventilation. As we understand the situation, the deposits of coal consist of several superimposed and nearly parallel veins descending into the earth from the outcrop on the side of a hill, at an angle of from sixteen to eighteen degrees. They vary in

thickness from five to fourteen feet, and are separated by strata of country rock varying from fifty to one hundred feet in thickness. They are mined through slopes driven into the hill, following the incline. From the slopes, at convenient distances, usually five hundred feet, and in a direction perpendicular to them, levels are driven in order to open up the bodies of the deposits. From the levels, and parallel with the direction of the slopes, are excavations called "rooms." The slopes consist of parallel entries, separated by a wall of coal; one being used for the purpose of hauling out coal and the other as an air passage. The slopes and levels are so connected by openings, either through the country rock or the intervening coal deposits, as to allow free passage of air currents. These are produced by a system of reversible fans which send the currents inward or outward, at the will of the operator, and are so adjusted in the direction of their revolution as to assist each other in maintaining a constant current, and keep the portion of the mine in which work is in progress free from gases. The veins are numbered from 1 to 6, beginning with the uppermost. At the time of the accident, fire had been burning for some days in two different rooms, one on one of the levels connected with the slope on vein No. 6, and one on level 4 on vein 4. The most convenient way of access to the point where the first was, was through slope No. 6. This portion of the workings was ventilated by one fan, known as "No. 6," on slope 6, assisted by another, designated as "No. 2," at the entrance to slope No. 2, between which and slope 6 there were open air passages. On the morning of the accident, work having been suspended because of the fire, a number of men were sent into the mine to subdue the one burning on slope 6. A short time afterward news was brought to the office of the company by some of them who had returned, that the others had been overcome by gas and would die unless they were rescued at once. The news was also circulated in the town of Red Lodge. Employees of the company not on duty, of whom deceased was one, and relatives of some of the imperiled miners, gathered at the company's office with the employees who

had returned, and, having obtained lights, went immediately to the rescue. It does not appear that any of these were requested to go, but rather that all went willingly, the impulse governing them being the desire to save the men, if possible. The defendant Pettigrew joined with the rest, some dozen in all. The deceased was in company with the witnesses Freeman and Atherton, two other of the company's employees. When they reached the men, who were near the bottom of slope No. 6, Bracey was so affected by the gas that he was entirely overcome and died before help could reach him. Atherton and Freeman were both helped out by the others. Six of the men sent in to subdue the fire lost their lives.

The evidence is silent as to what inspection had been made by the company to ascertain the conditions before the miners were sent in to subdue the fire, or as to whether any information concerning them had been given to any of the rescuers. It tends strongly to rebut the conclusion, however, that the deceased died from inhaling gases other than those generated by the fire. On this point Atherton testified: "I don't know just where the gas accumulated from; whether it came from No. 2 entry that we was looking at, or any of these rooms cut through there. It might have come out of them, but I don't know. It came from the fire, I believe; but which way it came I don't know." McKenzie, another of the rescuers who was overcome and had to be helped out, testified: "The gases which were in the mine at the time I entered, at about 10 o'clock in the forenoon (the time of the rescue), were occasioned by a fire down in the third west entry, and the air, being forced from there out past the place where I was, carried the gas with it." This is all the evidence on the subject to be found in the record. The circumstances also tend strongly to show that the conclusion of these witnesses is the correct one, for it appears that the miners engaged on the day before in an attempt to subdue the fire had experienced no inconvenience from the presence of gas, and that the accumulations which occasioned the loss of life were due, either to the stopping of the fans during the preceding night,

or to the inefficient operation of them during the morning prior to the time work was commenced. Indeed, there is no foundation in the evidence for the inference that gases in dangerous quantities were spontaneously generated in the abandoned workings.

The plaintiff having alleged in her complaint that Bracey's death was due to the inhalation of gases other than those generated by the fire, and having failed to furnish evidence to establish, directly or indirectly, the specific cause of it thus alleged, the motion for nonsuit was properly granted. The divergence thus appearing between the cause alleged and the evidence adduced to establish it is such a variance that it amounts to a failure of proof, and brings the case within the rule that, unless the evidence furnishes substantial support for the cause of action alleged, the plaintiff has failed to make out his case, even though the evidence shows negligence in other respects. (*Forsell v. Pittsburgh & Mont. Co.*, 38 Mont. 403, 100 Pac. 218; *Flaherty v. Butte El. St. Ry. Co.*, 40 Mont. 454, 107 Pac. 416.) The evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury. (*Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243.)

The judgment is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

SOLEM, RESPONDENT, v. CONNECTICUT FIRE INSURANCE
CO., APPELLANT.

(No. 2,833.)

(Submitted May 21, 1910. Decided June 6, 1910.)

[109 Pac. 432.]

*Fire Insurance—Arbitration—Effect—Defenses—False Statements—Complaint—When Proof Against General Demurrer.***Complaint—When Proof Against General Demurrer.**

1. The rule that if, upon the facts alleged in the complaint, the plaintiff is entitled to the relief demanded, or to any relief, the pleading is proof against a general demurrer, applies also to each count of the complaint.

Fire Insurance—Arbitration—Effect.

2. Where the parties to a contract of fire insurance upon destruction of the property agree to submit the amount of loss to arbitration, the award fixes the amount of loss sustained and is binding upon both parties; so that the insured cannot maintain an action upon the policy and have a readjustment of the loss, without first having the award set aside.

Same—Defenses—False Statements—Pleading.

3. The defense that a policy of fire insurance became void under one of its provisions because of false statements made by the insured in the proof of loss must be pleaded, otherwise it will be deemed waived; and the fact that defendant company did not become aware of the falsity of such statements until trial was not any excuse for failure to interpose an appropriate plea, since leave to amend its answer might then have been asked.

. Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by S. L. Solem against the Connecticut Fire Insurance Company of Hartford, Connecticut. Judgment for plaintiff, and defendant appeals therefrom and from an order denying it a new trial. Modified and affirmed.

Mr. M. P. Gilchrist, and Mr. W. D. Kyle submitted a brief in behalf of Appellant. Mr. Gilchrist argued the cause orally.

Messrs. Breen & Hogevoll filed a brief in behalf of Respondent. Mr. Hogevoll argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action contains two counts, and, while they are labeled "causes of action," it is manifest that the plaintiff sought to state but a single cause of action in two separate counts. The first count declares upon the policy of fire insurance; the second alleges the making of the contract of insurance on October 14, 1907, by which certain property belonging to the plaintiff was insured for one year for \$1,225. It gives a general description of the property, alleges the destruction of it by fire on February 19, 1908, and the loss suffered by plaintiff by reason thereof; that plaintiff furnished the required proof of loss; that thereafter, on May 12, 1908, plaintiff and defendant entered into an agreement, a copy of which is set forth, by which the amount of plaintiff's loss was submitted to a board of appraisers; that pursuant to such agreement the appraisers qualified, met, appraised plaintiff's loss, and made their return, in which plaintiff was awarded \$963.07. This second count then contains paragraph 8, as follows: "(8) This plaintiff further alleges that he is satisfied with the said award in so far as the said appraisers estimated the loss and valued the property that the said appraisers undertook to appraise; but this plaintiff alleges that the said arbitrators wrongfully refused to appraise the following described property." And this is followed by an itemized list of property, the loss upon which was estimated by plaintiff at \$386.20. It is then alleged that the plaintiff fully complied with all the terms and conditions of the policy binding upon him, but that defendant has refused to pay the amount of the award or the amount which plaintiff claims for loss sustained by him upon goods not appraised. A general demurrer to each count was overruled, and defendant answered. Issues were joined upon the allegations of the first count. The answer to the second count admits the corporate existence of the defendant company, the making of the agreement submitting the loss to arbitration, the appraisal and award, and denies every other allegation of the count. The trial resulted in a verdict and judgment in

favor of the plaintiff, for \$1,200. By direction of the court the plaintiff remitted from the amount of the judgment \$81.75, and defendant has appealed from the judgment and order denying it a new trial.

It is the rule in this state that if, upon the facts alleged in the complaint, the plaintiff is entitled to the relief demanded, or to any relief, the complaint is proof against a general demurrer. (*Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.) The same rule applies to each count of the complaint. This judgment cannot be sustained upon the first count. When the parties agreed to submit the amount of plaintiff's loss to arbitration, and pursuant to such agreement the appraisers made their award, such award, unless set aside, was binding upon both parties, and fixed the amount of plaintiff's loss. (*Springfield Fire & Marine Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315; Kerr on Insurance, sec. 217; Elliott on Insurance, sec. 317; 4 Joyce on Insurance, secs. 3247, 3250; Clement on Fire Insurance, p. 175; *Georgia Home Ins. Co. v. Kline*, 114 Ala. 366, 21 South. 958; 2 Am. & Eng. Ency. of Law, 2d ed., 794; 3 Cyc. 728; Revised Codes, secs. 7365-7374.) *Randall v. Phoenix Ins. Co.*, 10 Mont. 362, 25 Pac. 960, might on first impression appear to hold to a contrary view, and we do not agree with much that is said in that case; but the court remarks: "The observations in this case should be read in connection with the case of *Randall et al. v. American Fire Ins. Co.*" (10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953). The case of *Randall v. American Fire Ins. Co.*, discloses at once the theory upon which the court was proceeding in the *Phoenix Case*; and, assuming, for the purposes of this appeal, the soundness of the decision in the *American Case*, there does not appear to be anything in the decision in that case to justify the language used in the *Phoenix Case*. Since the amount of plaintiff's loss was fixed by the award, he cannot maintain an action upon the policy and have a readjustment of the loss without having the award set aside; and the first count of the complaint may, therefore, be dismissed from further consideration.

The plaintiff cannot rely upon the award, and at the same time ask to have it set aside. He may do either, but he cannot do both. However, the second count discloses that the plaintiff does not seek to have the award set aside, but does rely upon it; and while under certain circumstances he might in one cause of action sue for the amount of the award, and in another for the loss which he sustained upon goods covered by the policy of insurance, but which was not made subject to the appraisement, he has not done so in this instance; but his cause of action for the amount of the award is not vitiated by the other allegations in this second count, which may properly be treated as surplusage. This view requires the judgment to be reduced to the amount of the award in any event.

The second count appears to contain every necessary allegation in an action for the amount of the award (11 Ency. of Pl. & Pr. 411); and the demurrer to this count and the objection to the introduction of any evidence were properly overruled. While we are left somewhat in doubt as to the theory upon which the cause was tried in the district court, it is incumbent upon us to sustain the judgment, in whole or in part, if it can be done upon any rational theory. Without reviewing the evidence in detail, it is sufficient to say that it supports the cause of action stated in the second count as we have analyzed it; and plaintiff was therefore entitled to judgment for the amount of the award, unless reversible error was committed upon the trial.

Plaintiff offered in evidence the proof of loss which he made prior to the appraisement. This proof was in the form of an itemized statement, verified by plaintiff. One of the items enumerated in this statement is a piano, upon which plaintiff fixed a valuation of \$250 and claimed a loss in that amount. It appeared also that after this proof of loss was made, plaintiff was examined under oath by the adjuster for the insurance company, and upon such examination he testified that he purchased the piano in Minneapolis and paid for it \$250. Upon his cross-examination while a witness in his own behalf upon the trial of this case, he was made to testify that he purchased the piano.

in Butte and paid but \$100 for it. He testified, however, that he had repairs made upon it, which increased its cost to about \$180. The policy of insurance contains this provision: "The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; * * * or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." In view of the apparent conflict between the statements made by the plaintiff in his proof of loss and before the adjuster, and the evidence given upon the trial relating to this piano, defendant requested the court to give instruction 6a, but the request was denied, and there was not any instruction given upon the same subject. The requested instruction recites the provision of the policy above, and then continues: "This provision of the policy is binding upon the insured, and if you believe, from the evidence, that S. L. Solem willfully and intentionally swore falsely regarding his interest in the property alleged to have been destroyed, or that he willfully and intentionally swore falsely regarding any item thereof, then the policy became void and he cannot recover." Appellant insists that since it did not become aware of this seemingly false statement until the trial of the cause, the instruction should have been given, even though such false statement was not pleaded as a defense to the plaintiff's right to recover under any view of the case; and 2 Abbott's Trial Briefs, 1635, is cited to support the contention. The author of the text, however, refers only to one case, *McFetridge v. American Fire Ins. Co.*, 90 Wis. 138, 62 N. W. 938, and the decision of the Wisconsin court does not sustain appellant's contention at all; while the well-nigh universal rule is, that to avail itself of such a defense, the defendant must have specially pleaded it. (11 Ency. of Pl. & Pr. 422; *Greiss v. State Investment & Ins. Co.*, 98 Cal. 241, 33 Pac. 195.) And the reason for the rule is apparent. The provision of the policy quoted above is for the exclusive benefit of the insurance company and may be waived by it. (8

Current Law, 430, and cases cited.) Being for the special benefit of the company, it will be deemed to have been waived unless pleaded. And it does not avail the defendant company to say that its failure to make the proper plea arose from the fact that it first discovered that a false statement had been made at the time of the trial; for it was not too late then for the defendant to ask leave to amend its answer and interpose an appropriate plea, and, having failed to do so, the issue was not before the jury, and the offered instruction was properly refused.

The conclusion we have reached as to the character of this action of itself disposes of the other assignments of error. The cause is remanded to the district court with directions to modify the judgment by reducing the amount thereof to \$963.07, together with interest at eight per cent per annum, from July 20, 1908, sixty days after the date of the return of the appraisers, and for costs incurred in the district court; and, when so modified, the judgment will stand affirmed. The respondent will recover his costs in this court.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
JUNE TERM, 1910.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } **Associate Justices.**

**STATE EX REL. FLOYD ET AL., RELATORS, v. DISTRICT
COURT ET AL., RESPONDENTS.**

(No. 2,857.)

(Submitted April 19, 1910. Decided June 7, 1910.)

[109 Pac. 438.]

Inheritance Taxes—Estates of Nonresident Decedents—Constitution—Statutory Construction—Effect of Amendments—Probate Proceedings—Powers of District Courts.

Estates—Nonresident Decedents—Inheritance Taxes.

1. *Held*, that where administration of the estate of a nonresident testator is ancillary only, and in order to distribute it under the terms of the will it is necessary that it be delivered to the executor in the jurisdiction in which the decedent resided at the time of his death, the inheritance tax provided for by section 7724, Revised Codes, must be collected upon the amount so delivered.

Statutory Construction—Effect of Amendments.

2. Where, at the time of the enactment of a statute, the Codes contained a provision touching the same subject, the later legislation must be construed as controlling in so far as it is inconsistent with the earlier enactment.

Probate Proceedings—Powers of District Courts.

3. District courts, when sitting in probate, have no other powers than those expressly conferred by statute; their proceedings are regulated thereby and are *in rem*.

Statutory Construction—Constitutionality.

4. If possible, a statute must be so construed as to uphold its constitutionality.

Inheritance Taxes—Statute—Constitutionality.

5. *Held*, that the statute providing for an inheritance tax (sections 7724-7751) is not unconstitutional on the alleged ground that it fails to provide for notice to nonresident distributees of the appraisement of the estate for the purpose of fixing the tax, but that under sections 7738 and 7741, such a reasonable notice is provided, and an opportunity to be heard given, as not to leave the legislation open to the objection that it fails to provide due process of law.

ORIGINAL application for writ of *certiorari*, by the state, on the relation of John Floyd and another, to review an order of the District Court of the Second Judicial District in and for the County of Silver Bow. Writ quashed, and proceedings dismissed.

Mr. E. B. Howell submitted a brief in behalf of Relators, and argued the cause orally.

Mr. Albert J. Galen, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, appeared in behalf of Respondents. *Mr. Murphy* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari to the district court of Silver Bow county. On March 12, 1909, Charles Whiteside died testate at Ballamaconaghy, county of Down, Ireland, the place of his residence. His estate consists of real and personal property, a portion of which is situated in Ireland and the remainder in Silver Bow county, Montana. The part of the estate in Silver Bow county is approximately of the value of \$15,000. The will was duly admitted to probate by order of the High Court of Justice (Probate), King's Bench Division, District Registry of Belfast, on May 13, 1909. On June 9, 1909, a copy of the will and probate thereof, duly authenticated, was filed in the district court of Silver Bow county by the relators, both being named as executors and legatees, with a petition asking that it be admitted to probate; and it was thereafter, on June 19, 1909, duly ad-

mitted to probate. The relators were appointed executors, and, having qualified, entered upon the discharge of their duties and have continued therein. On the day the will was admitted to probate, the Honorable Michael Donlan, the judge of said court before whom the administration of the estate is pending, for the purpose of ascertaining and fixing the amount of inheritance tax assumed to be due and payable from the estate under the statute, and of his own motion, appointed one R. P. O'Brien to appraise the same and make report of his appraisement. Thereupon the said O'Brien qualified as such appraiser, and is now proceeding to make his appraisement and report. After setting forth the foregoing, the relators allege in their affidavit that the statute providing for an inheritance tax relates to estates which are to be distributed within the state of Montana, and provides for a tax upon distributive shares in such estates only; that the estate of Charles Whiteside cannot be distributed in the state of Montana, because the shares of the legatees named in the will cannot be determined by the respondent court or its judge; and hence that the order appointing O'Brien is void as in excess of jurisdiction. This court is asked to annul it. The application is by the relators as executors and also in their own right as legatees. The attorney general has interposed a motion to quash the writ and dismiss the proceedings, upon the ground that it appears from the facts stated in the affidavit that the relators are not entitled to the relief sought.

Counsel has submitted two questions for decision: (1) Whether, when administration in this state is ancillary only, and, in order to distribute the estate under the terms of the will, it is necessary that the portion thereof in this state be delivered to the executor or administrator in the jurisdiction in which the decedent resided at the time of his death, the tax must be collected upon the amount so delivered; and (2) whether the statute provides a means by which the tax may be ascertained and collected.

The will designates the executors also as trustees, and empowers them at their discretion "to sell, call in and convert"

all the property of the estate into money, and after paying out of the proceeds the funeral expenses, debts, etc., to pay specific legacies enumerated, and then to distribute the residue, if any, among all the legatees named "ratably in proportion" to the amount of their respective legacies. The legatees are widely scattered, some residing in Ireland, others in Australia, and still others in the United States. Some of them are not mentioned by name, but are designated as servants who at the time of Whiteside's death had been in his service for a period of not less than one year. Each of these is to receive £25, and such of them as had served more than one year are to receive double this sum. Two of the other legatees are mentioned, respectively, as "nephew" and "niece" of the testator, but the relation of the rest is not mentioned.

It is not questioned that, if Whiteside had been a resident of this state, the tax would have been proper. The relators contend, however, that since the amounts to be paid to each of the legatees cannot be ascertained by the court of Silver Bow county and distribution made, according to the terms of the will, of the portion of the estate within its jurisdiction, the only power the court has over it is to order it to be converted into money and delivered to the executors in Ireland, under the direction of section 7675, Revised Codes. This section provides: "Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court or judge may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court or judge, is a full discharge of the executor or administrator with the will annexed, in this state, in relation

to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court or judge." The argument is that the word "may," as used in conferring power upon the court, should be read "must"; that the provision is therefore to be regarded as mandatory; that, in order to collect the tax, the court must have jurisdiction of the distribution; and that, since this mandatory direction necessarily deprives it of this power, it takes away the power to collect the tax also. We are not required to determine whether this provision is mandatory or not. For present purposes, it may be conceded that it is, and that the state court, in every case falling within it, must deliver and not distribute the portion of the estate over which it has control. Even so, the delivery is merely a substitute for formal distribution, and cannot impair the power of the court to do anything which it may do before it surrenders its control. Whether the tax must or must not be collected is therefore to be determined by the answer to the question: Does the statute (Revised Codes, secs. 7724-7751) require it, and provide a legal mode for its collection?

Section 7724 provides: "After the passage of this Act, all property which shall pass by will or by the intestate laws of this state, from any person who may die, seised or possessed of the same, while a resident of this state, or if such decedent was not a resident of this state, at the time of his death, which property or any part thereof, shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death to any person or persons, or to any body politic, corporate, in trust or otherwise, or any property, which shall be in this state or the proceeds of all property outside of this state, which may come into this state, and which may be or should be distributed in this state to any such heirs,

devisees or legatees, by reason whereof any person or corporation shall become beneficially entitled in possession or expectancy, to any such property, or to the income thereof, other than to or for the use of his or her lawful issue, brother, sister, the wife or widow of the son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of Montana, and any lineal descendant of such decedent born in lawful wedlock, shall be and is subject to a tax of five dollars on every hundred dollars of the market value of such property, and at a proportionate rate for any less amount, to be paid to the treasurer of the proper county hereinafter defined for the use of said county and state in the proportions hereafter stated; and all administrators, executors and trustees shall be liable for any and all such taxes until the same have been paid as hereinafter directed. When the beneficial interests to any personal property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of Montana, or to any person to whom the deceased, for not less than ten years prior to death, stood in mutually acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock; in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property, and at and after the same rate for every less amount; provided that an estate which may be valued at a less sum than seventy-five hundred dollars shall not be subject to any such tax or duty. In all other cases the rate shall be five dollars on each and every hundred dollars of the clear market value of all property and at the same rate for any amount, provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to any such duties or tax; provided further, that said tax shall be levied and collected upon the increase of all property arising between the date of death and the date of the decree of distribution, and upon all estates which have been probated before, and shall be

distributed after the passage and taking effect of this Act." This provision is ambiguous and somewhat uncertain in its application. It was analyzed and construed by this court in *Hinds v. Wilcox*, 22 Mont. 4, 55 Pac. 355. It is clear that the intention of the legislature in enacting it was, that the tax must be paid whenever any property passes to those who take by testamentary disposition in any form or under the laws of succession, except in case of real estate passing directly to the father, mother, husband, wife, brother, sister, or any of the favored class, and except when exemptions are specifically mentioned. (*Hinds v. Wilcox, supra; In re Tuohy's Estate*, 35 Mont. 431, 90 Pac. 170.) Subject to the exceptions mentioned, it applies to all property of every kind, passing by testamentary disposition or succession under the laws of this state, whether the owner was at his death a resident of this state or not; for the express provision is: "After the passage of this Act, all property which shall pass by will or by the intestate laws of this state, from any person who may die, seised or possessed of the same, while a resident of this state, or if such decedent was not a resident of this state at the time of his death, which property or any part thereof, shall be within this state * * * shall be and is subject to a tax," etc. By this express provision the tax is imposed in case of nonresident, as well as resident, decedents; and the measure of it is the clear market value, or, what is the same thing, the money value of the property passing by testamentary disposition or succession, as the case may be. And since the estate under consideration is of a value in excess of \$7,500, and all the legatees must be paid in money, none of the exemptions apply. Hence the whole of the estate is subject to the tax. It may be that, when the time comes to fix the amount to be paid, a part of it will have to be fixed at one rate and a part at another, according as the relationship of the legatees to the testator is made to appear. Such a proportion of the amount as will go to the favored class, if any of the legatees fall within that class, will be subject to the tax at the lower rate, and the rest at the

higher rate; but these proportions will be easily ascertainable when the facts appear.

The payment of the tax is in no wise dependent upon the distribution of the estate, nor upon the amount of the specific legacies or distributive shares. It is due and payable upon the value of the estate, at the death of the decedent, and, though the executor or administrator is granted some indulgence as to the time within which payment must be made, if he delays beyond the time fixed, the estate must pay interest for the delay, and he must give bond for the payment with personal security. (Revised Codes, sec. 7727.) Therefore, while under the requirement contained in section 7675, *supra*, the power to order distribution according to the terms of the will may be assumed to have been taken from the state court, and it must, when the estate is ready for distribution, order its delivery to the executor or administrator having charge of the administration in the jurisdiction of the decedent's residence, this does not relieve the estate from the burden of the tax, nor impair the power of the court to collect it. (Revised Codes, sec. 7740.) Even if that section should originally have been construed as counsel contend, it must be borne in mind that it was a part of the Codes at the time the statute providing for a tax upon inheritances was enacted, and it must now be construed as not controlling, but as subordinate to the subsequent legislation, so far as the latter is inconsistent with it.

Passing to the consideration of the second question, we notice, first, that in sections 7725 and 7727 there is an implication that the basis or measure for computing the amount of the tax is the value of the estate as it is made to appear by the appraisement of it in the ordinary way. (Revised Codes, sec. 7493 *et seq.*) This is not exclusive, however. Section 7729 is an additional provision. It was evidently intended to apply to cases where there has been delay in payment and there is uncertainty as to the value of the property and hence as to the amount of the tax, due to appreciation, or to the character of the interest which passes to the beneficiary, such as future contingent interests or

incomes from them, referred to in section 7725. When this condition has arisen, the court may proceed under the latter section, as was done in the case of *In re Tuohy's Estate, supra*, to ascertain the increase in value which has accrued between the date of the death of testator and the date of the decree of distribution. It was intended to apply, also, in any case and at any time when, in the opinion of the court, circumstances require an appraisement to be made; for an appraisement may be had "as often and whenever occasion may require."

But it is said by counsel for relators that the tax is imposed, not upon the property which passes to the legatee or successor, but upon the right or privilege to take; that the court must, therefore, have jurisdiction not only of the distribution, but also of the distributees in order to levy the tax; and that, since neither of these essentials exists, there can be no lawful levy of the tax in this case. In other words, in order to levy and collect the tax, the court must not only have jurisdiction of the property, but must also have the power to ascertain each distributive share, and have before it, by legal notice, all distributees, else the distributees are deprived of their property without due process of law, within the prohibition contained in the fourteenth amendment to the Constitution of the United States. What we have said of section 7675, *supra*, sufficiently indicates our view of its purpose. The delivery provided for by it, when the property is ready for distribution, serves all the purposes of distribution, and the power to direct the delivery is tantamount to the power to order distribution directly to the persons entitled to take.

But counsel say there is no effective method provided for giving notice to the distributees, and hence the statute is invalid as a whole, at least in so far as it affects the nonresident distributees. Counsel puts the query: "How, for instance, can the appraiser give the notice required by law to the unnamed servants of the deceased who are to share in the estate?" The jurisdiction of the district court, when sitting in probate, is statutory (*Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82), and its proceedings are regulated by statute and are *in rem* (*State ex*

rel. Ruef v. District Court, 34 Mont. 96, 115 Am. St. Rep. 510, 85 Pac. 866, 6 L. R. A., n. s., 617, 9 Ann. Cas. 418; 18 Cyc. 64); and, while it must be conceded that all persons who are interested in the disposition of estates are entitled to some kind of notice of proceedings which affect their interests, and to a hearing or an opportunity to be heard (*In re Davis' Estate*, 35 Mont. 273, 88 Pac. 957), if the statute provides for reasonable notice and an opportunity to be heard, it is not open to the objection that it does not provide due process of law.

Section 7738 provides: "When the value of an inheritance, devise, bequest, or other interest subject to the payment of said tax is uncertain, the district court in which the probate proceedings are pending, or the judge thereof on his own motion, or on the application of any interested party shall appoint some competent person as appraiser, as often as, and whenever occasion may require, whose duty it shall be forthwith to give such notice, by registered mail, to all persons known to have or claim any interest in such property, and to such persons as the court may direct, of the time and place at which he will appraise such property, and at such time and place to appraise the same, and to make the report thereof, in writing, to said court, together with such other facts in relation thereto, as said court may by order require, to be filed with the clerk of such court; and from this report the said court shall by order forthwith assess and fix the market value of all inheritances, devises, bequests, or other interests, and the tax to which the same is liable, and shall immediately cause notice thereof to be given, by registered mail, to all persons known to be interested therein," etc. This provision is not clear and explicit; but to avoid condemning it as unconstitutional, and thus defeating the purpose of the legislature in enacting the legislation, we must give it such a construction as will uphold it, if this can be done. The phrase "and to such persons," preceding the words "as the court may direct," seems to be useless, since no person is entitled to notice unless he has an interest. If, however, the latter phrase be read in connection with the clause "to give such notice, by registered mail," etc.,

the provision is made clear. Thus read, it means that the appraiser shall give such notice by registered mail to all persons known to have a claim or interest in the property, as the court may direct, of the time and place, etc. This must be the sense in which the legislature intended the provision to be understood, else the word "such," qualifying the word "notice," has no intelligible reference. So construed, the provision lays upon the court the duty to fix the time for the appraisement, within such reasonable limits as will give every person interested the opportunity to be present and have a hearing, if he so desires. It may be difficult, in a given case, for the court to ascertain the names and postoffice addresses of all of the persons interested; but this must be done by the court in Silver Bow county or by the court in Ireland, and the task is no more difficult for one than the other. If the inconvenience and difficulty encountered in this regard is to determine the power of the court to proceed, then there would often arise cases in which the court would be at a loss as to what disposition it should make of a distributive share. The court admitted the will to probate. It may be presumed that it has knowledge or the means of knowledge of all persons interested in the property disposed of by it, and can impart this knowledge to the appraiser in its direction to him as to the time which must intervene before the appraisement is made. It is further provided that, after the tax has been assessed, the court shall "immediately cause notice thereof to be given by registered mail to all persons known to be interested therein." Thus an additional notice is provided for, which requires knowledge in the court of the names and whereabouts of all interested persons. There is implied by this requirement, also, the right in any or all of the persons interested to be heard; for the proceeding is before the court or judge, and any person interested, if he demands it, must be accorded a hearing.

Section 7741 further provides for the issuance of a citation to any person interested, when any tax accruing under this statute is due, but has not been paid, to show cause why it should not be paid. The service of the citation, and the time, manner and

proof of it, and the hearing and determination under it, together with the manner of enforcing the determination, must conform to the provisions of the Code of Civil Procedure applying to other citations issued during probate proceedings. A hearing is provided for, and any legal cause may be assigned as a reason why the tax should not be paid. The action of the court in fixing the amount of the tax and directing its payment may also be reviewed on appeal, either from the order itself or from the decree directing the delivery. (Revised Codes, sec. 7098; *In re Tuohy's Estate, supra.*)

Our statute is modeled after the statute enacted by the legislature of the state of New York in 1885. The New York statute did not provide for the payment of an inheritance tax upon the property of nonresident decedents found in that state. (*In re Enston's Estate*, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464.) The provisions contained in it for the giving of notice were substantially identical with those contained in our own statute. They were examined by the appellate court of New York in *In the Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685. After a review of them all, the court reached the conclusion that the provisions for notice were amply sufficient to accord every person interested due process of law.

There is no question made here as to the sufficiency of the notice which the district court required the appraiser to give. We are of opinion that the double notice provided for in section 7738, the citation for which provision is made in section 7741, and the provision for an appeal, are sufficient, provided only the court or judge in fixing the time in the notice so fixes it as to give a reasonable opportunity to those interested to be heard. In doing this, the court will doubtless be guided by the analogies of the statutes fixing the time for appearance after publication of summons, or those providing for notice in other cases. (Revised Codes, secs. 6520, 7148.)

In the disposition of this application we have not noticed the question whether *certiorari* or prohibition is the proper remedy;

but have directed our attention to the merits of the questions presented.

The motion to quash is sustained, and the proceeding is dismissed.

Dismissed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. EDWARDS ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 2,869.)

(Submitted May 21, 1910. Decided June 7, 1910.)

[109 Pac. 434.]

*Cities and Towns—Police Department—Metropolitan Police Law
—Contempt—Costs—Contemnor not Liable.*

Mandamus—Return—Contents.

1. The return to a peremptory writ of mandate should contain a certificate of compliance, unless something impossible or unlawful is commanded, or such a change of conditions has taken place as to make compliance improper, in which case the facts should be stated.

Same—Contempt—Violation of Metropolitan Police Law—Evidence—Sufficiency.

2. Where, after the mayor of a city had been directed by writ of mandate to reinstate certain policemen in their respective offices from which they had been ousted contrary to the provisions of the Metropolitan Police Law (Revised Codes, secs. 3304–3317), his action in instructing the chief of police to include two special policemen, whose appointment had theretofore been made without warrant of law and whose continued employment would consume the funds available for police purposes, to the exclusion of those whose reinstatement had been ordered, among those who were to be regularly employed, constituted sufficient justification for finding him guilty of contempt of court.

Same—Contempt—Who may be Guilty of.

3. It was not necessary that aldermen of a city, who, knowing of the issuance of a writ of mandate to the mayor commanding him to reinstate in office certain policemen, theretofore unlawfully removed, and ordering their salaries to be paid, by their concerted action assisted the latter in defeating the purpose of the order of court, should have been parties to the original *mandamus* proceeding or served with the writ, to make punishment for their contumacious conduct in obstructing the administration of the law proper.

Same—Scope of Order—Law of the Case.

4. By affirming the judgment of the district court directing, on proceedings in *mandamus*, the reinstatement of policemen to their offices and the emoluments thereof, the supreme court impliedly held that the remedy by writ of mandate was available to secure to a public officer the salary attached to his office; hence argument on the question, on application for a writ of supervisory control to annul a judgment in contempt, was foreclosed.

Same—Contempt—Costs—Contemnor not Liable.

5. That portion of the judgment of conviction for contempt requiring the contemnors to pay the costs incident to the proceedings, in addition to the fines imposed, was without warrant in law, and therefore unenforceable.

APPLICATION for a writ of supervisory control to annul judgments of conviction for contempt in *mandamus* by the state, on the relation of Frank J. Edwards and others, against the District Court of the First Judicial District and James M. Clements, a judge thereof. Heard upon respondents' motion to dismiss the proceedings. Dismissed.

Mr. Edward Horsky, for Relators, submitted a brief and argued the cause orally.

Mr. William T. Pigott and *Mr. Massena Bullard* appeared in behalf of Respondents and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This proceeding grew out of two certain causes heretofore before this court: *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 106 Pac. 695; *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703. On February 9 of this year the *remittitur* in each of the two above causes was filed in the office of the clerk of the district court of Lewis and Clark county; the peremptory writ of mandate in each cause was issued and served; and on February 19 the defendant Edwards made his return thereto. On April 28, 1910, Quintin and Bailey each made an affidavit and filed it with the district court of Lewis and Clark county, charging Edwards with contempt in each instance, in failing to carry out the mandate of the court, and also charging seven members of the city council with willfully obstructing the process

of the court. The several persons thus charged with contempt appeared, and, after a hearing, the district court adjudged them guilty of contempt in each instance and imposed fines. Application was thereupon made to this court, by the defendants in the contempt proceedings, for a writ of supervisory control to annul the judgments. An order to show cause was issued, and upon the return the respondents, court and judge, interposed a motion to quash the order to show cause and to dismiss the proceeding, and upon this motion the cause was argued and submitted.

The judgment of the district court, in the *Quintin Case* above, commanded the defendant in that case, Frank J. Edwards, as mayor of the city of Helena, "forthwith to reinstate said relator [Quintin] in his position, place and right of policeman or patrolman of the city of Helena, Montana, and in all duties, privileges, and emoluments of said position or place, and to admit him to the use and enjoyment of his said right or office, from which he has been and is now unlawfully precluded by the said defendant." The judgment in the *Bailey Case* was of like import, except that it directed the restoration of Bailey to the office of police captain. Upon appeal, each of these judgments was affirmed by a majority of this court. (*State ex rel. Quintin v. Edwards*, above; *State ex rel. Bailey v. Edwards*, above.)

The writ of mandate in the *Quintin Case*, directed to and served upon Edwards, commands: "That immediately upon service upon you of this writ, you reinstate said Moses Quintin, the plaintiff and relator, in said position, place, and right of policeman or patrolman of said city of Helena, and in all duties, privileges and emoluments of said position or place, and admit relator and plaintiff to the use and enjoyment of the said right or office, from which he has been and is now so unlawfully precluded by you." The writ in the *Bailey Case* is to the same effect, except that he is directed to be restored to the office of captain of police.

Section 7216, Revised Codes, contemplates that, after service of a peremptory writ of mandate, a return shall be made by the party upon whom the writ is served; and while the Code does not specify what the return shall contain, the general rule is:

“The return differs from the return to an alternative writ in that it should contain merely a certificate of compliance, unless something impossible or unlawful is commanded, or such a change of conditions has taken place as to make compliance improper, in which case the facts should be stated.” (26 Cyc. 493.)

When the language of the peremptory writ of mandate quoted above is recalled to mind, the return of the mayor of itself evidences a failure on his part to comprehend the import of the writ, or a manifest purpose to evade it. The return in the *Quintin* and *Bailey Cases* is the same, and it is anything but a certificate of compliance with the writ. In the first paragraph of the return in the *Bailey Case*, the mayor states that he has directed the chief of police “to take such steps as would be necessary to reinstate said relator to his former position, and to also inform him that no provision was made for the payment of his salary; no appropriation had been made to meet such expenditure and no tax levy had been made to meet any expenditure in excess of that now required for the present number of officers who are serving and who were regularly appointed under the provisions of the metropolitan police bill, and whose warrants are drawn upon the police fund.” The return then incorporates in and makes the principal part of it a communication which the mayor addressed to the chief of police, the pertinent portions of which upon this inquiry are: “The amount now in the police fund representing the amount remaining from the previous tax levy is sufficient only to meet the salary, during the present fiscal year, of the chief of police, sergeant of police, six patrolmen, and the two jailers. If this is not fact, please advise me. You are directed, therefore, to employ only such number of men as the funds on hand will compensate, with due regard to the period of time which the tax levies, when made, were intended to cover.

* * * You are advised, also, that out of the police fund, salaries may be paid of the following patrolmen: Jos. D. Gossette, Fred W. Gardner, and Fred. Mundt; also, John Fister, serving instead of Samuel Pulliam, who has not resigned, Samuel Wil-

son, serving instead of Edw. Burke, who has been granted a leave of absence, and William Bossler who may serve in the place of Ed Wilson, who is not serving, and who has not resigned.

* * * Following the abolition of the office of captain of police, no provision was made for the compensation of such officer. It would appear necessary, therefore, to place such officer on the eligible list until the necessary provision for compensation is made. If it is the desire of the former captain of police to serve either as captain or patrolman without compensation or to look to the city or to a fund of the city other than the police fund for compensation, such will be his privilege and you are directed to so advise him. As to patrolmen, this may also apply to Farnum and Quintin, who may serve under the same conditions if they so desire, or to be placed upon the eligible list.”

Upon the trial of the contempt charges it was made to appear that during February and March, 1910, John Fister and Samuel Wilson were employed as policemen, and they are designated by the mayor as two of those whose names should be placed upon the pay-roll to receive compensation from the police fund. So far as the record before us is concerned, it appears that these two men are what are called special policemen; that they do not serve for any specified term; and that they have not been appointed to their offices under the Metropolitan Police Law. We will not stop to consider whether the mayor may appoint such special policemen in the event that there are not any available men on the eligible list, for Bailey and Quintin were available, but when there are available men on the eligible list, the appointment of such specials is absolutely void and their payment a misapplication of the public funds; and the direction of the mayor to the chief of police to include these so-called special policemen among those who were to be regularly employed and whose employment would consume the funds, to the exclusion of Bailey and Quintin, was of itself sufficient justification for the judgments as to the mayor.

But more than this. The mayor informs the chief of police that the office of captain of police has been abolished. The de-

cision of the majority of this court was to the contrary. Bailey was ordered reinstated in his office as captain of police, with all the privileges, duties and emoluments thereof. But the mayor directs the chief of police to place Bailey on the eligible list or to permit him to serve as captain or patrolman without compensation, or to look to some fund other than the police fund for his compensation, and this last portion of his communication is made applicable to Quintin as well. The evidence discloses that these instructions were followed by the chief of police. The evidence further discloses that after the so-called reinstatement of Bailey and Quintin, they were singled out from the other members of the police force and subjected to petty annoyances and humiliating treatment altogether unworthy of those responsible for it, and altogether inconsistent with the idea that any effort, in good faith, had been made to restore them to their former positions.

But emphasis is laid upon the fact that the members of the city council who were adjudged guilty of contempt were not parties to the Bailey and Quintin proceedings and were not served with the writ of mandate. Of course, if the Bailey and Quintin proceedings sought to compel some affirmative action from these members of the council, then they would be entitled to a day in court in the *mandamus* proceedings, but such was not the fact. Bailey and Quintin sought reinstatement in their respective offices and to the duties, privileges and emoluments thereof to the same full extent as before their ouster, and they succeeded. These aldermen are not punished for their failure to do some affirmative act or acts, but for their willful and contumacious conduct in obstructing the administration of the law. They knew the writ of mandate had been issued in each case, and its purpose and extent, and under such circumstances it is not necessary that they should have been parties to the original proceedings or served with the writ. This record discloses that when the claims of Bailey and Quintin for February salary were presented to the city council, they were referred to a committee consisting of three of these petitioners, viz., Geier, Shelley and

McCormick, who reported as follows: "As to the parties' claims for services from February 10, 1910, being for eighteen days in February, we find that the said parties were reinstated by the mayor pursuant to the mandate of the court, as more fully described in the return made in response to said mandate. We therefore recommend that the council take action in conformity with the return so made by the mayor, a copy of which is hereto attached." Upon motion, that report was adopted, each of these petitioning aldermen voting in the affirmative. And, as if to give added emphasis to their contempt for the decision of this court and the mandate of the district court, the city council on March 21, 1910, passed, and the mayor approved, an ordinance making appropriations for the ensuing fiscal year, in which ordinance there is not any provision made for the compensation of a captain of police. (Upon the passage of this ordinance, petitioners Fisk and McCormick did not vote.) These acts are recalled in this connection, as showing, or tending to show, willful intent and bad motives—not to intimate that by the writ of mandate the district court was attempting to control, or might control, the legislative functions of the city council. To say that these acts do not amount to a demonstration of concerted action upon the part of these aldermen to assist the mayor in preventing Bailey and Quintin from reaping the fruits of their victory—to prevent them from enjoying the emoluments of their respective offices—would be a serious reflection upon human intelligence.

It is urged that the writ of mandate went too far in directing the reinstatement of Bailey and Quintin to the emoluments of their respective offices, and it is said that *mandamus* is not a remedy available to secure to a public officer the salary attached to his office; but, so far as this proceeding is concerned, argument upon that question is foreclosed. By affirming the judgment of the district court, which directed such restoration, the decision of the majority of this court impliedly held that such remedy was available. Upon the issuance of the *remittitur* from this court, the decision of the majority in the *Bailey and Quintin Cases* became the law of this state, and, whatever difference of

opinion there may be as to the soundness of those decisions, there cannot be any as to the duty of every good citizen to obey.

The mayor cannot be heard to say that the city's funds are not sufficient to pay these regular policemen, but are sufficient to pay the so-called special policemen. Good faith on his part required the immediate discharge of the so-called special policemen if the funds were not sufficient to pay them, and to pay Bailey and Quintin. And good faith on the part of these aldermen required that they should not interpose by word or act to prevent Bailey and Quintin from getting the salary to which each was entitled under the mandate of the court. That Bailey and Quintin were not restored to their respective offices, with all the duties, privileges and emoluments thereof, to the same extent as before their dismissal, is so perfectly apparent, that further reference to the evidence is not necessary.

But it is said that the judgments in contempt are uncertain. Each recites that all the material averments in the affidavits are found to be true by the district court; and it is now said that it is uncertain what averments were considered material. But this criticism is hypercritical. Had the trial court omitted the word *material*, we would not feel disposed to interfere or criticise the judgments; for it appears to us that the evidence would justify a finding that every averment of disobedience has been proven. It is true that the court stated at the conclusion of the hearing that the evidence failed to show that Bailey had sought to exercise all the duties of police captain and had been refused; but this statement is not necessarily inconsistent with the finding made. In order to prove the charges it was not necessary for Bailey to show that he had sought to exercise all the duties of the office of police captain and had been refused. The evidence in support of the specific acts of contempt set forth is overwhelming. It surpasses the bounds of credulity to say that Bailey was restored to all the rights, privileges and duties of the office of police captain, as defined in section 133 of the ordinances of the city of Helena.

However, the judgment in each case is erroneous in requiring the contemnors to pay the cost in addition to the fines imposed (*State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 Pac. 493; *State ex rel. Morse v. District Court*, 29 Mont. 230, 74 Pac. 412); but such error does not call for action on our part at this time. That portion of each judgment is not enforceable.

The record before us does not present facts sufficient to warrant us in interfering with the action of the district court. The motion to quash is sustained, and this proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE EX REL. BUCKNER, RESPONDENT, v. MAYOR OF BUTTE, APPELLANT.

(No. 2,838.)

(Submitted May 25, 1910. Decided June 8, 1910.)

[109 Pac. 710.]

Cities and Towns—Police Department—Metropolitan Police Law—Examining and Trial Board—Offices—Vacancy—De Facto Officers—Validity of Acts.

Cities and Towns—Metropolitan Police Law—Examining and Trial Board—Creation of Office.

1. In cities of the first class the office of member of the Examining and Trial Board of the police department is created by the Metropolitan Police Law (Revised Codes, section 3304), which commands, in effect, that there shall be such a board; hence the contention that there was no such office until the mayor had nominated its members and the council had confirmed them was without merit.

Offices—Vacancies.

2. An office newly created becomes *ipso facto* vacant in its creation.

Cities and Towns—Police Department—De Facto Officers—Validity of Acts.

3. Where the mayor of a city of the first class had appointed three residents to constitute the Examining and Trial Board of the police department created by section 3307, Revised Codes, such persons, having qualified, were *de facto* officers whose official acts were legal notwithstanding the city council repeatedly refused to confirm them.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

MANDAMUS by the state, on the relation of William J. Buckner, against the mayor of the city of Butte, Charles P. Nevin, incumbent, to compel the reinstatement of relator as captain of police. From a judgment awarding a peremptory writ and from an order denying a new trial, defendant appeals. Affirmed.

In behalf of Appellant, there was a brief by *Mr. Edwin M. Lamb, Mr. John R. Boarman*, and *Mr. N. A. Roterling*. *Mr. Boarman* argued the cause orally.

The exercise of the power to appoint officers must pursue the mode prescribed by the statute conferring the power. (23 Am. & Eng. Ency. of Law, 2d ed., p. 344; *Ward v. Cook*, 78 Ill. App. 111; *People v. Hall*, 104 N. Y. 170, 10 N. E. 135; *State v. Peelle*, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.) Where the appointing officer or body is authorized to make the appointment only with the consent of some other body, there can be no appointment until such consent has been given. (23 Am. & Eng. Ency. of Law, 2d ed., 346; *People v. Bissell*, 49 Cal. 411; *State ex rel. Breeden v. Sheets*, 26 Utah, 105, 72 Pac. 335; *Watkins v. Watkins*, 2 Md. 341; *Dyer v. Bayne*, 54 Md. 90; *Commonwealth v. Collins*, 8 Watts (Pa.), 331; *Commonwealth v. Allen*, 128 Mass. 308.) Where, as in this case, the appointment is made as the result of the nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had. (29 Cyc. 1372; *County Commrs. of Calvert Co. v. Hellen*, 72 Md. 603, 20 Atl. 130; *Merrill v. Garrett Co.*, 70 Md. 269, 16 Atl. 723; *Howerton v. Tate*, 68 N. C. 546; *In re Marshalship for Southern Dist.*, 20 Fed. 379; Abbott's Municipal Law, p. 1476; Mechem on Public Offices, sec. 114; *People v. Cazneau*, 20 Cal. 507; *People v. Molyneaux*, 40 N. Y. 115.)

In *Norton v. Shelby County*, 118 U. S. 425, Mr. Justice Field announces it as the doctrine that there can be no such thing as a *de facto* officer except when he is the incumbent of a *de jure*

office. (See, also, 29 Cyc. 1391; *Reddy v. Tinkum*, 60 Cal. 458; *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *Ward v. Cook*, 78 Ill. App. 111; *Decorah v. Bullis*, 25 Iowa, 12; *In re Hinkle*, 31 Kan. 712, 3 Pac. 531; *Hildreth v. McIntyre*, 1 J. J. Marsh. 206, 19 Am. Dec. 61; *State v. McFarland*, 25 La. Ann. 547; *Carleton v. People*, 10 Mich. 250; *State v. O'Brien*, 68 Mo. 153; *In re Quinn*, 152 N. Y. 89, 46 N. E. 175.)

The mere possession of an office is not sufficient to make the incumbent a *de facto* officer. Either he must have color of title, or his possession must be acquiesced in by the public. (29 Cyc. 1392; *Buck v. Hawley*, 129 Iowa, 406, 105 N. W. 688; *Woods v. Bristol*, 84 Me. 358, 24 Atl. 865; *Olson v. Trego Co.*, 8 Kan. App. 414, 54 Pac. 805; *Hugg v. Ivins*, 59 N. J. L. 139, 36 Atl. 685; *People ex rel. Falk v. Dike*, 37 Misc. Rep. 401, 75 N. Y. Supp. 801; *Baldwin v. Nesmyth*, 33 App. Div. 634, 56 N. Y. Supp. 318; *State v. Taylor*, 108 N. C. 196, 23 Am. St. Rep. 51, 12 S. E. 1005, 12 L. R. A. 202.)

Messrs. Kirk, Bourquin & Kirk, and *Mr. W. E. Carroll*, submitted a brief in behalf of Respondent. *Mr. George M. Bourquin* argued the cause orally.

De facto officers are those in actual possession and discharging the duties of an office, under color of title or by public acquiescence. Color of title comes from an appointment, however irregular or made by incompetent authority, or by part only of a number whose joint action is necessary to make a legal appointment. (8 Ency. of Law (2), 790; 29 Cyc. 1390 *et seq.*; *People v. Roberts*, 6 Cal. 214; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.)

The legislators must have understood that upon the Metropolitan Police Act becoming law, the offices of members of such board existed ready for appointees to be named to fill them, for it authorized the mayor to name them. In this, the case is very like *Merchants' Nat. Bank v. McKinney*, 2 S. D. 106, 48 N. W. 845. That a vacancy existed immediately upon the law going

into effect is not disputed. (*In re Fourth Judicial District*, 4 Wyo. 133, 32 Pac. 850.)

Where an Act provides that the executive shall appoint an officer, with the advice of the legislative body, the officer is thereby created, though the Act nowhere so declares. (*People v. Addison*, 10 Cal. 7.) Where a valid law provides for the creation of a corporate body, that body, however irregularly organized under the law, in exercise of the franchise thereof, is such body *de facto*. (*Tulare etc. Co. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 780.)

MR. JUSTICE SMITH delivered the opinion of the court.

On May 6, 1907, the so-called "Metropolitan Police Law" (Article VI, Chapter III, sections 3304-3317, Revised Codes [Chapter 136, Laws 10th Leg. Sess.]) went into force and effect. On May 8, 1907, the Honorable Joseph Corby, then mayor of Butte, a city of the first class, "nominated and appointed," by a writing filed in the office of the city clerk, as members of the Examining and Trial Board of that city, Messrs. George C. Fitschen, Thomas Driscoll and Harry Blumkin, who each took the oath and assumed to enter upon the exercise of the duties of his office. Subsequently Fitschen died, and Harry Sultzer was nominated in his place. As Sultzer's status is the same as was that of his predecessor, we shall not differentiate between the two in our consideration of the case, but shall treat the board as originally constituted.

On May 13, 1907, the Examining and Trial Board notified the mayor in writing that the relator had been examined and placed upon the eligible list of applicants for appointment to the police department, and, further, that he had been examined by the board as an applicant for the position of captain of police. On the same day the mayor in writing "appointed" the relator as captain of police and notified the board, also in writing, that he had made such appointment. The relator on the same day filed his bond and oath of office. On May 22, 1907, according to the records of the city council, the mayor presented to the council

the "appointment" of Messrs. Fitschen, Driscoll and Blumkin as members of the Examining and Trial Board, but the appointment or nomination, as the case may be, was not confirmed, and, although the same nominations were presented to the council at every meeting thereof, save two, during the two years of Mayor Corby's incumbency of the office of mayor, the same were never consented to by the council. However, the members of the board were regularly renominated by the mayor after each rejection of their names by the council, and immediately qualified by filing new oaths. No other names were ever presented to the council for these offices by Mayor Corby, and no other persons ever assumed to act as members of the board. The so-called board held open sessions in the council chamber at the city hall, and numerous applicants for places on the police force were examined by them. Fifty-seven members of the police force took the examination before the board, and all recognized the board as the Examining and Trial Board of the city of Butte. It was admitted at the trial that Messrs. Fitschen, Driscoll and Blumkin duly organized themselves into a board, adopted rules and regulations, and from time to time throughout Mayor Corby's administration held meetings, examined applicants, and assumed to act as an Examining and Trial Board, and that during all of their incumbency they were not disturbed therein by any rival claimants to the office. After serving a probationary term of more than six months, the relator was on the sixteenth day of April, 1909, "nominated and appointed" by the mayor, in writing, as a member of the police department to serve as captain of police "during good behavior or until by age or disease he becomes permanently incapacitated to discharge his duties as such." He actually performed the duties of captain of police until May 20, 1909.

On May 3, 1909, the Honorable Charles P. Nevin became the mayor of Butte. On May 19, 1909, charges were filed against the relator, and he was suspended from office by Mayor Nevin until the charges were disposed of. The charges were sustained by an Examining and Trial Board, theretofore nominated by

Mayor Nevin, and confirmed by the council, but were afterward nullified and set aside by the district court of Silver Bow county. After the judgment of the court had been entered and a copy thereof served upon the mayor, the relator demanded reinstatement as captain of police. In the meantime the mayor had nominated one Norton to that office, and the nomination had been concurred in by the city council. He accordingly refused to reinstate the relator, and refused to permit his name to remain upon the pay-roll of the department. The object of this proceeding is to compel the appellant, as mayor, "to admit the relator to the said office of captain of police," and to recover damages in the sum of \$500. The district court of Silver Bow county entered a judgment awarding to relator a peremptory writ of mandate directing his reinstatement as captain of police, without damages. From that judgment and an order denying a new trial, an appeal has been perfected.

1. It is contended by counsel for the respondents that by virtue of the foregoing facts the gentlemen appointed by Mayor Corby as members of the Examining and Trial Board constituted a *de facto* board, and as such their acts cannot be successfully questioned in this proceeding. It is claimed that they were in actual possession, discharging the duties of the office, under color of title and by public acquiescence.

The law provides that there shall be in every city and town of this state a police department, which shall be organized, managed and controlled as in the Act provided. (Revised Codes, sec. 3304.) Also, that in cities of the first class the mayor shall nominate, and, with the consent of the council, appoint three residents of such city, who shall constitute a board to be known by the name of the "Examining and Trial Board of the Police Department." The council of any town or city, other than a city of the first class, may provide by ordinance for such a board in such town or city. (Revised Codes, sec. 3307.) It will therefore be observed that as to cities of the first class the law is mandatory, and, as to other cities and towns, it is permissive only. When this law went into effect, it undoubtedly became

the duty of the mayor of every city of the first class to appoint an Examining and Trial Board. Every city in this state must have a police department. We know that the city of Butte has had such a department for years. It was admitted at the hearing in this court that the ordinances of the city relating to the organization of the police department provide for an office designated as that of captain of police. When the Act in question went into effect, the city of Butte had a police department, one of the offices of which was that of captain of police.

It is most earnestly contended by the learned counsel for the appellant that the office of member of the Examining and Trial Board has no existence until the mayor nominates and the council confirms. Not so. The office in cities of the first class is created by the law itself. It is commanded, in effect, that there shall be such a board. The mayor is required to nominate its members. The language employed has the same force and effect in this statute as the words "there is hereby created" would have. (*People v. Addison*, 10 Cal. 1.) The mandatory provision for filling the offices in cities of the first class would be rendered nugatory by a construction of the law which would give to the mayor or council the option of creating or not creating the board. The intention of the legislature in this regard is plainly evidenced by the fact that in cities and towns, other than cities of the first class, it in terms clothed the council with power to exercise its own judgment as to whether or not an Examining and Trial Board shall be created. Therefore the *office* of member of the Examining and Trial Board of the police department of the city of Butte actually existed on May 8, 1907. The office, having been newly created, became *ipso facto* vacant in its creation. (*In re Fourth Judicial District*, 4 Wyo. 133, 32 Pac. 850-854; *State ex rel. Smith v. Askew*, 48 Ark. 82, 2 S. W. 349; *Mechem's Public Offices and Officers*, sec. 132.) "There is no technical nor peculiar meaning to the word 'vacant.' * * * It means empty, unoccupied; as applied to an office, without an incumbent. There is no basis for the distinction that it applies only to offices vacated by death, resignation, or other-

wise. An existing office, without an incumbent, is vacant, whether it be a new one or an old one." (*Stocking v. State*, 7 Ind. 326. See, also, Throop on Public Officers, p. 419, sec. 431.)

It was the duty of the mayor within a reasonable time after the vacancies occurred to nominate three qualified citizens to fill the offices. This he did by designating Messrs. Fitschen, Driscoll and Blumkin as his choice for the places. He purported to appoint them to fill the vacant offices. They qualified by taking the oath of office, and proceeded to exercise the duties of their positions. On May 13, 1907, the relator took the examination before this board, and was placed upon the eligible list. He was immediately appointed by the mayor as captain of police, for a probationary period. Nine days later, to-wit, on May 22, the nominations to the Examining and Trial Board were presented to the council, voted upon, and not concurred in. It is now strenuously urged upon this court that all acts of this board were null and void, for the reason that its members had not been confirmed by the council. Mr. Mechem in his treatise, heretofore cited, says at page 60, section 124: "Where the authority to make appointments can be exercised only by and with the consent and approval of the senate or other similar body, its exercise has no effect unless such consent or approval be given." No cases are cited in support of the text; but we are inclined to the opinion that in a general way it correctly states the law. (See 23 Am. & Eng. Ency. of Law, 2d ed., 346; 29 Cyc. 1372.) We shall assume, therefore, for the purposes of this case, that Mayor Corby's nominees were not *de jure* officers. It is contended by the appellant that the mayor is not vested with the power of appointment at all, but only with the right to nominate; and it is argued that without the consent of the council no appointment is made. The mayor's act of selecting the nominees is, however, a most important one, and, when it is concurred in by the council, a *de jure* officer is created. Therefore the mayor's act of nomination becomes a part of the joint act of appointment. Our decision that Messrs. Fitschen,

Driscoll and Blumkin were *de facto* officers, however, incidentally disposes of this argument.

The rights of the people are paramount to those of the mayor and council. They should, of course, be able to agree upon appointments. In order to do this, in the case at bar, one or the other must have given way. Both refused to do so. The council continued to reject the mayor's appointments, and the mayor as industriously reappointed the same men. But counsel say: "The pretended appointment of such persons by the mayor to constitute the members of the Examining and Trial Board the day after their rejection by the city council was a bold usurpation of power on the part of the mayor, and had no warrant in law, and was a patent evasion of the plain requirement of the Act relating to the appointment of an Examining and Trial Board." It is not always easy to determine where the blame lies. Fortunately courts are not called upon to do so. Even though it be conceded that the mayor might have presented other names to the council, such concession does not assist the appellant. Perhaps the council would have refused to confirm anyone who was appointed by Mayor Corby, though new appointments were made at every meeting. Is the law nullified because of such deadlock? Not at all. The persons appointed were *de facto* officers, and as such their acts were not void.

One of the rules of the English common law was to the effect that the acts of one who, although not the holder of a legal office, was actually in possession of it under some color of title or under such conditions as indicated the acquiescence of the public in his action, could not be impeached in any suit to which such person was not a party. Such a person was called a *de facto* officer. This principle has been incorporated into the common law of the United States. (29 Cyc. 1389.) In the case of *People v. Roberts*, 6 Cal. 214, it was held that, though the appointment of a sheriff by a county judge was void, yet the acts of such sheriff, as a *de facto* officer, were good. (See, also, *Woodward v. Fruitvale Sanitary District*, 99 Cal. 554, 34 Pac. 239.)

The supreme court of Arizona, in *Jeffords v. Hine*, 2 Ariz. 162, 11 Pac. 351, said: "The public has an interest in the continuous and unbroken discharge of official duty, and the necessities thereof, and cannot wait to try the title of conflicting claimants to an office. For this reason it has come to be held, so often as to be now settled, that the official acts of the incumbent of an office, with whom alone the public can, under the circumstances, transact business, shall be regarded as legal. The affairs of society could not be carried on in any other way than by treating as valid the official acts of persons *de facto* in office." In *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, it was held that the judgment of a judge *de facto* was valid.

This court in the case of *Carland v. Commissioners of Custer County*, 5 Mont. 579, 6 Pac. 24, through Mr. Justice Galbraith, said: "Persons in the actual and unobstructed exercise of office must be held to be legal officers except in proceedings where their official character is the issue to be tried as against themselves." This court, also, in *Parks, Petitioner for Writ of Habeas Corpus*, 3 Mont. 426, in an opinion by Mr. Chief Justice Wade, after a review of the authorities, concluded that the acts of a *de facto* police magistrate could not be questioned in a collateral proceeding. (See, also, *State ex rel. Bickford v. Cook*, 17 Mont. 529, 43 Pac. 928.)

It is a part of the judicial history of this state that Charles R. Pollard, Esq., was appointed a justice of this court by President Cleveland about the year 1886. He was never confirmed by the senate of the United States; yet Volume 6 of the Montana Reports discloses the fact that he took part in the deliberations of the court. The opinion in the case of *Miles v. Edwards*, 6 Mont. 180, 9 Pac. 814, was prepared by him, and no one has ever doubted that his acts as a *de facto* judge were legal.

2. Counsel, however, contend that the selection of the relator as captain of police for a probationary term before the names of the members of the Examining and Trial Board had been submitted to the council invalidated his appointment. We think

there is no force in this suggestion. Messrs. Fitschen, Driscoll and Blumkin were assuming to act officially at the time of his examination, and we think they were *de facto* officers from the moment of their appointment and qualification. We do not regard the fact that the mayor submitted their names to the council as of importance. They would still be *de facto* officers, under the facts in this case, if the mayor had been of opinion that there was no necessity for confirmation, and had therefore entirely withheld their names from the council.

3. Counsel for the appellant insist that incompetent testimony was admitted. We find no prejudicial error in this regard. The facts are mostly of record, and are practically undisputed.

Let the judgment and order of the district court be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

McHATTON, APPELLANT, v. GIRARD, RESPONDENT.

(No. 2,855.)

(Submitted June 7, 1910. Decided June 15, 1910.)

[109 Pac. 704.]

Attorneys' Fees—Evidence—Insufficiency—New Trial.

1. *Held*, that the evidence introduced in an action to recover an attorney's fee was insufficient to justify a verdict in favor of plaintiff, and that defendant was entitled to a new trial as a matter of right.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by John J. McHatton against Louis Girard. From an order granting defendant a new trial, plaintiff appeals. *Affirmed.*

Mr. John J. McHatton filed a brief and argued the cause *pro se*.

In behalf of Respondent, there was a brief and oral argument by *Mr. J. L. Wines*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by John J. McHatton and John W. Cotter, as copartners doing business under the firm name of McHatton & Cotter, to recover the sum of \$2,166.55, alleged to be due as a balance on an account for services rendered by them as attorneys, and for moneys disbursed for costs and expenses at the special instance and request of defendants. After the action was commenced, Cotter died, and thereafter it proceeded in the name of McHatton as surviving partner. The defendants deny that the services were rendered or that they were reasonably worth the amounts charged, or that any moneys were paid out by the plaintiffs at their instance and request. It is also alleged that prior to the commencement of the action all claims and demands of every kind held or owned by the copartnership or by McHatton, the surviving partner, had been fully paid and discharged. At the trial plaintiff on his own motion dismissed the action as to the defendant Société Anonyme des Mines de Lexington (hereafter referred to as the French company), and the court directed a nonsuit as to the defendant Rueger. The jury returned a verdict against defendants Berthemet and Girard for the full amount claimed to be due, and judgment was entered accordingly. This appeal is from an order granting the defendant Girard a new trial. The ground of the motion was insufficiency of the evidence to justify the verdict. Counsel for plaintiff contends that the court abused its discretion in granting the order. After an examination of the somewhat voluminous record, we are of the opinion that Girard was entitled to a new trial as a matter of right, because the evidence furnishes no substantial basis for a verdict against him.

Prior to 1896 the French company was a corporation, organized and existing under the laws of the Republic of France. It was the owner of mining property in Silver Bow county. The defendant Rueger was its agent in the state of Montana, and had charge and control of its property. During the year 1897 the company went into liquidation, and on June 30, 1897, the defendant Berthemet became the owner of all of its property by conveyance by the trustee having charge of the liquidation. Berthemet thereafter leased the property to Rueger. Rueger also had a general power of attorney from Berthemet, authorizing him to do everything in connection with the property which Berthemet might himself do. Berthemet held the title until May 17, 1902, when he conveyed to the defendant, Girard. Rueger thereafter had a general power of attorney from Girard. This defendant and Berthemet both reside in Paris, France, and, so far as appears from this record, never were in the United States. When Berthemet succeeded to the property, an action was pending against the French company for damages claimed by the Butte & Boston Mining Company, a Montana corporation, for trespass by the French company upon its property. In this action the Butte & Boston Company had secured a judgment. A new trial having been awarded to the French company, an appeal had been taken by the plaintiff to this court. Pending the appeal, Rueger, acting for Berthemet or the defendant French company, employed John W. Cotter to appear for the defendant. This he did. The order was affirmed on April 11, 1899. (*Butte & Boston Min. Co. v. Société Anonyme des Mines de Lexington*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111.) For this service Cotter made a charge of \$750. At the beginning of the year 1899, Cotter had entered into a copartnership with the plaintiff, and the charge for this service was entered upon the copartnership books under date of October 4, 1899. As originally made, the charge was against the French company. Afterward the name of Berthemet was added to the title of the account. Thereafter all the charges were made against the French company and Berthe-

met jointly. When the appeal was disposed of, Rueger told Cotter that, if the case should be tried again, he, Cotter, would be expected to conduct the trial for defendant, and requested him to do so. The case was never tried. In the meantime other litigation arose with reference to the property. The firm was employed by Rueger, for Berthemet, to attend to all of this litigation, the employment being made from time to time as occasion arose, through Mr. Cotter. The litigation was conducted by Mr. Cotter personally, Rueger rarely meeting Mr. McHatton or having any consultation with him. After defendant Girard became the owner of the property by conveyance from Berthemet, Rueger continued to manage it. At this date all the litigation had been finally disposed of, except the *Butte & Boston Case* and a case entitled *Berthemet v. Holbrook et al.* The record does not disclose definitely what disposition was ever made of the former. In the latter there had been a trial as to some of the defendants, and judgment had been rendered and entered for the plaintiff. During the months following up to October judgments in favor of the plaintiff were rendered and entered against all of the remaining defendants, some of them after trial and others upon stipulation. The last was entered on October 4.

The charges on the books of the firm began with the year 1899, though four items appear to have been transferred from Cotter's individual books, which had been charged in 1898. The full amount of all the items charged for all purposes at the end of the *Holbrook Case* was \$3,832.65. Of this sum items footing up \$2,593 were charged subsequent to May, 1902. These are \$2,000 charged for service in the *Holbrook Case*, on July 23, \$50 charged for services in a case entitled the *City of Walker-ville v. Rueger*, on the same date; \$500 charged as retainer in the *Butte & Boston Case*, on November 3; \$10 for personal advice given to Rueger, charged on August 25; and \$33 made up of items of fees paid to the clerk and a witness, at various dates during the year. These latter charges were for payments made ostensibly during the progress of the *Holbrook Case*. The items of credit consist of payments made from April 13, 1900,

to September 10, 1902, and amount in all to \$1,685. Of the items charged subsequent to May 17, 1902, the fee of \$50 in the case of *Walkerville v. Rueger* was for services rendered in a case in which a son of defendant Rueger was defendant, and had been disposed of finally two years before Girard became the owner of the property. So that it appears that the sum for which recovery is sought is the balance of the fee charged in the *Holbrook Case*, the retainer charged in the *Butte & Boston Case*, and the fees paid during the latter part of the year 1903. Employment in both of these cases had been made by Berthemet, through Rueger, over three years before Girard became the purchaser. And while it appears that Rueger was acting after May 17, 1902, as the general agent for Girard, there is no evidence in the record which lends support to the conclusion that when Girard became the purchaser, he agreed with Berthemet or with the firm of McHatton & Cotter, either directly or indirectly, to assume the liabilities of the former to the latter and discharge them. On the contrary, Rueger testified, in substance, that it was understood between him and Cotter, whom he consulted almost exclusively, that Berthemet was to pay all the expenses of the litigation. If Cotter so understood the contract of employment, then Berthemet alone is chargeable. In the absence of this understanding, he alone is still chargeable. The retainer in the *Butte & Boston Case* became due and payable at the time the firm was retained; and liability to pay for services in the *Holbrook Case*, however long it continued, and all outlay made in that connection, attached to Berthemet. These liabilities could not be shifted from Berthemet to Girard by the mere volition of the attorneys without some agreement, express or implied, on the part of the latter, even though he received benefit from their services.

It is entirely apparent from this brief résumé of the evidence adduced at the trial that a judgment against Girard for the balance of plaintiff's account could not be sustained upon any sound principle. The order is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CARPENTER, APPELLANT, v. NELSON, RESPONDENT.

(No. 2,839.)

(Submitted June 8, 1910. Decided June 15, 1910.)

[109 Pac. 857.]

Conversion—Complaint—Sufficiency—Certainty.

1. The complaint in an action for the conversion of a steer, a general demurrer to which had been sustained by the trial court, examined and *held* not to be so ambiguous, unintelligible and uncertain as to fail to set forth the plaintiff's cause of action in such language as to enable a person to determine from its reading what the facts relied upon by plaintiff were.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

ACTION by Albert Carpenter against Harry Nelson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Cause submitted on briefs of counsel.

Mr. J. L. Staats, for Appellant.

Mr. H. A. Bolinger, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.


This case originated in a justice of the peace court of Gallatin county. The amended complaint filed in that court, upon which a trial was had, reads as follows:

“Comes now the above-named plaintiff, and by leave of court first had and obtained files herein his amended complaint, and alleges the following facts:

“(1) That plaintiff on the seventh day of December, 1907, and continuously since has been and now is the absolute and unqualified owner and entitled to the immediate possession of the following described personal property, to-wit: One yearling steer, branded ‘X’ on right hip and with right ear cropped.

“(2) That on the seventh day of December, 1907, this plaintiff purchased of defendant at Bozeman, Montana, fifty-five head of yearling steers, fifty-four of which were branded with ‘X’ on the right hip and with right ear cropped, paying therefor the sum of seventeen and 50/100 dollars (\$17.50) for each head thereof.

“(3) That in pursuance of said sale of said cattle by defendant to plaintiff on or about the same day, the defendant executed and delivered to plaintiff a bill of sale for said cattle, containing a description of said cattle as branded with ‘X’ on right hip and with right ear cropped.

“(4) That after the said cattle had been delivered by defendant to plaintiff pursuant to said sale, the plaintiff observed that one of the steers of said bunch purchased by him did not have the brand ‘X’ on the right hip of said animal, nor on any other place on said animal, nor was the right ear of said animal cropped, as described in said bill of sale; but that, instead of the brand ‘X’ on the right hip of said animal, as described in said bill of sale, there was the brand thus: ‘’ on the right hip and both ears of said animal were cropped.

“(5) That plaintiff has frequently demanded of defendant, since said sale and before the commencement of this action, the animal as described in said bill of sale and which was purchased by plaintiff as aforesaid, and has frequently tendered before the commencement of this action back to defendant the steer obtained by plaintiff at said sale, the brand on which did not correspond with the description of said property in said bill of sale, and which said animal never at any time belonged to defendant, but that defendant has at all times refused to deliver to plaintiff the possession of the steer purchased by plaintiff, or to pay the plaintiff the sum of thirty-two and 00/100 dollars (\$32.00) or any other sum, the value thereof, or to accept the tender of the steer that plaintiff obtained at said sale, but that defendant has converted said animal so claimed by plaintiff to his own use.

“(6) That defendant still wrongfully withholds and detains said animal so claimed by plaintiff from the possession of plaintiff, and converted by defendant to his own use as aforesaid, to plaintiff's damage: First, in the sum of thirty-two and 00/100 dollars (\$32.00), the value of said property; and, secondly, in the sum of fifty and 00/100 dollars (\$50.00), for time and money expended by plaintiff in the pursuit of said property up to the time of the institution of this action.

“Wherefore plaintiff demands judgment against said defendant for the sum of thirty-two and 00/100 (\$32.00), the value of said property, and for fifty and 00/100 dollars (\$50.00) damages, as herein alleged, and all costs of suit in this action in plaintiff's behalf expended.”

To this complaint a general demurrer was filed, but the same was overruled. After issue of fact joined, the plaintiff had a verdict and judgment in his favor, from which judgment the defendant appealed to the district court of Gallatin county. In that court the general demurrer to the amended complaint was argued and submitted, and afterward sustained. The court refused to allow the plaintiff to amend, and judgment was entered in favor of the defendant, and from that judgment an appeal is taken to this court.

It is contended on the part of respondent that it is impossible to tell from reading the complaint whether the action is for conversion or is based upon a breach of warranty of title. It may readily be agreed that the complaint is somewhat indefinite and uncertain; but we do not feel that we can say on that account that it does not state facts sufficient to constitute a cause of action. As has heretofore been intimated by this court, we are satisfied that a complaint may be in its phraseology so ambiguous, unintelligible and uncertain as to fail to set forth the plaintiff's cause of action in ordinary and concise language. (See *Lynch v. Great Northern Ry. Co.*, 38 Mont. 511, 100 Pac. 616.) But this case does not appear to fall within the rule. It is true that the plaintiff alleges that only fifty-four of the steers were branded “X”; but it is manifest that the pleader is referring

to the fifty-four steers other than the one which he says did not belong to the defendant. We are operating under the modern reformed system of practice and pleading, and the days when hearings upon the merits may be avoided by the interposition of technicalities have fortunately gone by. The only thing that is enjoined upon plaintiff under our Code is that he shall state the facts constituting his cause of action in ordinary and concise language. We think a layman would have no difficulty in determining from this pleading what the facts relied upon by the plaintiff are. It seems clear to us that what he complains of is that the defendant has received and retains the sum of \$17.50, the purchase price of an animal which he refuses to deliver, and that he claims damages on account thereof. What the exact measure of his damages is it is unnecessary to decide upon this appeal. But at any rate we think his complaint states facts sufficient to constitute a cause of action for the sum of \$17.50 in any event. (See *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988.)

The judgment of the district court of Gallatin county is reversed, and the cause is remanded, with directions to overrule the demurrer to the amended complaint filed in the justice of the peace court.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

GIBERSON ET AL., RESPONDENTS, v. TUOLUMNE COPPER
MINING CO., APPELLANT.

(No. 2,841.)

(Submitted June 9, 1910. Decided June 15, 1910.)

[109 Pac. 974.]

*Mines and Mining—Adverse Suits—Declaratory Statements—
Sufficiency—Amended Statements—Effect — Trial — Amend-
ments of Pleadings After Judgment—Harmless Error.*

Mines and Mining—Declaratory Statements—Sufficiency.

1. A declaratory statement of the location of a quartz lode mining claim, from the recitals in which it was fairly inferable that the discovery shaft cut the vein at a depth of at least ten feet below the surface, was a substantial compliance with the statute, and therefore sufficient.

Same—Declaratory Statements—Exclusion from Evidence—When Proper.

2. A declaratory statement of the location of a quartz lode claim was properly excluded where the party offering it had failed to make a preliminary showing relative to the dimensions of the posts used for marking the boundaries, or those of the mounds of earth or rock surrounding each post, or how far they had been set in the ground.

Same.

3. Where some time prior to discovery of a vein of mineral-bearing rock in place by defendant in an adverse suit, plaintiffs had completed their location of the ground in controversy by filing an amended declaratory statement which cured errors in the description of natural objects and permanent monuments in, and related back to, the original statement, the court properly excluded a like statement offered by defendant, since the latter paper could not operate to cut off the intervening rights of plaintiffs.

Same—Trial—Pleadings—Amendments After Judgment—Harmless Error.

4. Where in an adverse suit, after ordering a decree in favor of plaintiffs, the trial court permitted them to amend their complaint to admit proof of a second amended declaratory statement, and to introduce it in evidence, any error in such action was without prejudice to defendant, such paper not having been necessary to plaintiffs' case.

Appeal from District Court, Silver Bow County; Geo. B. Winston, Judge.

ACTION by Allen Giberson and others against the Tuolumne Copper Mining Company. From a judgment in favor of plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

Messrs. Noon, Wilson & Day submitted a brief in behalf of Appellant. *Mr. Bernard Noon* argued the cause orally.

Mr. Lewis A. Smith submitted a brief in behalf of Respondents, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On May 20, 1908, the Tuolumne Copper Mining Company made application in the United States Land Office at Helena for patent to the Smoky Moke quartz lode mining claim. Within sixty days from the date of the first publication of the notice of application, these respondents filed in the land office their adverse, claiming a portion of the ground under their location of the Merrimac quartz lode mining claim. The adverse was allowed, and within thirty days thereafter this suit was brought to determine which, if either, of the parties was entitled to patent to the area in dispute. Issues having been joined, the cause was tried, and a judgment rendered and entered in favor of plaintiffs (respondents here), from which judgment and an order denying a new trial the defendant company appealed.

The evidence offered on behalf of plaintiffs discloses that the ground covered by these conflicting locations was formally located as the "Helen G." claim, which had been abandoned; that on January 1, 1904, a discovery was made by plaintiffs of mineral-bearing rock in place at the abandoned shaft of the "Helen G." claim; that notice of location of the Merrimac was posted near this shaft, and within thirty days thereafter a new discovery shaft was sunk on the vein disclosed, the new shaft being some three feet east of the abandoned shaft; that the corners were marked, and on February 25 a declaratory statement was filed for record in the office of the county clerk and recorder of Silver Bow county. On May 23, 1905, an amended declaratory statement was filed, and on March 9, 1909, a second amended declaratory statement was filed for record. When the plaintiffs offered in evidence their declaratory statement and first

amended declaratory statement, objections were made thereto; but the objections were overruled, and error is now predicated upon the rulings made. It is urged that neither of these declaratory statements complies with the law in force at the time. (Sections 3611 and 3612, Political Code, 1895, as amended in an Act of the Seventh Legislative Assembly approved March 15, 1901 (Laws 1901, p. 140).) The amended declaratory statement was made to correct some errors in the description of the adjacent claims and other natural objects and permanent monuments, to which reference was made in the original declaratory statement, and was authorized by Laws of 1901, page 56.

Objection is urged to the original and amended declaratory statements that in neither one does it appear that the shaft cuts the vein at a depth of at least ten feet below the surface of the ground, and *Dolan v. Passmore*, 34 Mont. 277, 85 Pac. 1034, is cited in support of the contention that, for the reason given, these declaratory statements are void. But in *Helena Gold & Iron Co. v. Baggaley*, 34 Mont. 464, 87 Pac. 455, this court said: "It was suggested during the argument that the case of *Dolan v. Passmore* applies too strict a rule, in that under it the notice must state that the preliminary work has been done, as required in section 3611. * * * The requirement of the statute that the notice must state the dimensions could have no other purpose than to show a compliance with the law; and while we do not say that the notice should state definitely that the excavation cuts the vein at the depth or for the length required by the statute, yet the statement of the dimensions must be such as to leave at least an inference that such is the case, and a notice which fails to thus set forth the work done certainly does not conform to the spirit of the statute." The word "notice," used above, refers to the declaratory statement.

From the amended declaratory statement it appears that a discovery was made of a vein of mineral-bearing rock in place, and that a shaft four by eight feet and more than ten feet deep was sunk at the point of discovery. It seems fairly inferable, then, that the shaft was sunk on the vein for a depth of more

than ten feet, and that it must have cut the vein at that depth. This amended declaratory statement gives the name of the claim, the names of the locators, the date of location, the number of lineal feet claimed along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein. It gives a description of the boundaries of the claim, and its location with reference to adjacent claims and other natural objects and permanent monuments. It then gives the location of the discovery shaft—or point of discovery, which is the same—as one hundred feet west of the easterly end line, one hundred and ten feet east of the westerly end line, and equidistant between the side lines, and gives the dimensions of the shaft as stated above. This seems to be a substantial compliance with the statute in force at the time this location was made, and fully meets all the objections urged against it.

In seeking to make proof of its claim to the ground in controversy under the Smoky Moke location, the defendant introduced as a witness E. W. Merritt, who testified that he made discovery for the predecessors of defendant of mineral-bearing rock in place, in the abandoned shaft of the "Helen G." claim, on December 8, 1904. The witness testified: "With reference to locating this claim, I will say that I went to the bottom of that old shaft and sunk it ten feet deeper than it was and put up corners and so forth. I posted the notice of location on the east side of the 'Helen G.' shaft in a box."

A witness, Robert Buckley, for the defendant, also testified: "In regard to sinking, posting, and putting up posts and marking them at this time in this claim, I will say that we started at the northeast corner with No. 1 post with a monument of rocks around it and sank it in the ground with earth first, and then put rocks around it, and then went to the northwest corner and put up a corner there and a monument of just the same description, and then I went south and put up a corner there, and had two men with me, and then I went over there to the east, southeast corner and put up a monument there."

This is all the testimony given or offered relating to the markings of the boundaries of the Smoky Moke claim. It does not appear whether the posts used for marking the boundaries were or were not four inches square; whether they were or were not four feet six inches in length; whether they were or were not set one foot in the ground; or whether the mound of earth or rock, or both, surrounding each post, was or was not four feet in diameter, or was or was not two feet in height. With the record in this condition, defendant offered in evidence the declaratory statement of the Smoky Moke claim; but the trial court held that the preliminary showing was insufficient to admit it; and certainly error cannot be predicated upon the ruling made at that time. Furthermore, it is conceded by counsel for appellant that the original declaratory statement of the Smoky Moke claim did not comply with the statute in force at that time.

Immediately after the foregoing ruling was made, the amended declaratory statement of the Smoky Moke claim filed for record January 8, 1909, was offered in evidence, but was excluded, apparently for the same reason that the original declaratory statement was excluded. Long prior to the time this amended declaratory statement was filed for record, respondents had completed their location of the ground in controversy under their Merrimac location; and, if this amended declaratory statement of the Smoky Moke claim had been received in evidence, it could not have operated to cut off the intervening rights of respondents. It would relate back to, and cure the defects in, the original declaratory statement, just as respondents' amended declaratory statement related back and cured the defects in their original declaratory statement. (*Butte Consolidated Min. Co. v. Barker*, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995.) But respondents' amended declaratory statement, when filed, completed their Merrimac location as of date February 25, 1904, some time prior to discovery by the predecessors in interest of appellant. The amended declaratory statement of the Merrimac claim was filed for record May 2, 1905, before appellant had

perfected its location of the Smoky Moke claim, if in fact it ever did comply with the law in attempting to make the location of that claim.

After the trial court had ordered a decree in favor of plaintiffs, it permitted them to amend their complaint to admit proof of their second amended declaratory statement, and permitted them to introduce that amended declaratory statement in evidence. Whatever criticism might be made of this practice, if error at all was committed, it was error without prejudice; for it was not necessary to introduce this second amended declaratory statement, and its admission did not add anything to, and could not detract from, the case already made by the plaintiffs. These observations dispose of all the specifications of error.

Since there has not been called to our attention any reversible error in this record, the judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH did not hear the argument, and takes no part in the foregoing decision.

STATE, RESPONDENT, v. MOXLEY, APPELLANT.

(No, 2,845.)

(Submitted June 9, 1910. Decided June 15, 1910.)

[110 Pac. 83.]

*Criminal Law—Receiving Stolen Property—Information—Allegation of Value—Surplusage—Evidence of Other Like Offenses—Admissibility.***Receiving Stolen Property—Information—Contents.**

1. As in charging the offense of larceny, so in charging that of receiving stolen property, the information must identify the offense by a description of the things stolen, and state the name of the owner, if known.

Same—Evidence—Sufficiency.

2. Evidence, circumstantial in character, examined, and held to have made out a case from which the jury could find the presence of the three elements essential to establish the offense of receiving stolen property, to-wit: (1) That the property in question was stolen; (2) that the defendant bought or received it knowing it to have been stolen; and (3) that he did so for his own gain or to prevent the owner from regaining possession of it. (Revised Codes, sec. 8662.)

Same—Information—Variance—Failure of Proof.

3. In a prosecution for the crime of receiving stolen property, its ownership must be proved as alleged; hence where the ownership, as laid in the information, was jointly in three persons named, and the evidence disclosed that most of the articles belonged to one of them, and the remaining ones to the other two individually, there was such a variance as amounted to a failure of proof.

Same—Allegation of Value—Surplusage—Quantum of Evidence.

4. An information charging the offense of receiving stolen property need not allege its value; where the value is alleged, the allegation may be treated as surplusage. The state's evidence need go no further than to show that the property had some value; and where this was done the fact that it failed to establish that the property was worth as much as stated in the information did not furnish any ground of complaint to defendant.

Same—Evidence of Other Like Offenses—Admissibility.

5. While evidence that accused had been implicated in similar transactions with thieves prior to the commission of the offense for which he was on trial was proper for the purpose of showing guilty knowledge on his part, testimony of such dealings had after that date was inadmissible.

Same.

6. Testimony that defendant had been guilty of the offense of receiving stolen property on occasions prior to the one for which he was on trial was immaterial in the absence of proof that the property involved in those instances had been stolen.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

EDWARD MOXLEY was convicted of the crime of receiving stolen property. He appeals from the judgment of conviction. Reversed and remanded for a new trial.

Mr. John Lindsay, and *Mr. A. J. Rosier*, submitted a brief in behalf of Appellant. *Mr. Rosier* argued the cause orally.

The general rule of law is that all descriptive matters in the information, although unnecessarily particular, must be proved as laid. (22 Cyc. 48; *State v. McDonald*, 10 Mont. 22, 24 Am. St. Rep. 25, 24 Pac. 628; *McAllister v. State*, 55 Tex. Cr. 264, 116 S. W. 582.) The ownership of the property must be proved as laid in the indictment. (*Commonwealth v. Billings*, 167 Mass. 283, 45 N. E. 910; *Bryan v. State*, 54 Tex. Cr. 59, 111 S. W. 1035; *Miller v. People*, 13 Colo. 166, 21 Pac. 1025.) On an indictment for receiving stolen goods, if the value of the goods is not proved, a conviction must be reversed. (*Sands v. State*, 30 Tex. App. 578, 18 S. W. 86.) Where the pleader elects to allege in the information the value of the property actually received by appellant, this fact must be proven.

The evidence in this case is purely circumstantial. The law does not permit decisions to be made on remote inferences. (*State v. McCarthy*, 36 Mont. 234, 92 Pac. 521; *Dyson v. State*, 26 Miss. 362; *Rye v. State*, 8 Tex. App. 153; *United States v. Ross*, 92 U. S. 282, 23 L. Ed. 708.)

In behalf of the State there was a brief by *Mr. Albert J. Galen*, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General. *Mr. Murphy* argued the cause orally.

It is not necessary, in a prosecution under section 8662, a violation of which is charged in the information filed herein, to allege the name of the person who sold the goods, or to prove, upon the trial, that they were unlawfully taken by any particular person. (*People v. Avila*, 43 Cal. 196; *People v. Ribolsi*,

89 Cal. 492, 26 Pac. 1082; *People v. Clausen*, 120 Cal. 381, 52 Pac. 658.)

In *People v. Clausen, supra*, the court says that whether the defendant knew that goods were stolen is to be determined by all the facts in the case. It is not necessary that he had heard the facts from eye-witnesses. He is required to use circumspection usual with prudent and considerate persons taking goods by private purchase, and this is eminently the case with dealers who buy at greatly reduced prices. The purchase of goods, however, at an under-valuation, is not, in itself, sufficient proof of guilty knowledge in the buyer that the goods were stolen, and an instruction to this effect would be erroneous, as was held in *People v. Levison*, 16 Cal. 99, 76 Am. Dec. 505.

The third specification reaches the admissibility as an exhibit in evidence of the bill of sale, being the record of the transaction kept by the second-hand man for the police department of the city. We think there can be no doubt of the admissibility of this evidence. *State v. Clausen*, above referred to, is authority to the effect that failure to enter a description of goods in a similar book, in accordance with requirements of ordinances, can properly be considered as tending to show guilty knowledge, the entry being part of the *res gestæ*, and goes so far as to hold that an instruction to that effect is properly given.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, charged by information with the crime of receiving for his own gain stolen property, knowing the same to have been stolen, was found guilty and sentenced for a term of six months in the county jail. He has appealed from the judgment.

The charging part of the information is the following: "That at the county of Silver Bow, state of Montana, on or about the second day of July, A. D. 1909, and before the filing of this information, the said defendant, Edward Moxley, did willfully, and unlawfully, and feloniously, and for his own gain, and to

prevent the owners from again possessing their own property, buy certain carpenter tools (a more particular description of which said carpenter tools is to the county attorney aforesaid unknown), of the value of two hundred and seventy-five (\$275) dollars, of the personal property of one E. G. Johnson, Charles Johnson, and C. M. Rude, which had been previously stolen, and the said defendant, Edward Moxley, then and there well knowing the same to have been feloniously stolen," etc. The principal contention made in defendant's behalf is that the evidence is insufficient to justify the verdict.

The evidence introduced on behalf of the state may be summarized as follows: On July 2, 1909, E. G. Johnson, Charles Johnson, and C. M. Rude were employed as carpenters in one of the school buildings in the city of Butte. When they quit work for the day they left their tools, consisting of planes, hammers, saws, levels, chisels, etc., together in a chest or box. On their return on the following morning to resume work, the chest and tools were gone. Some of the tools belonging to E. G. Johnson were stamped with his name. About two weeks afterward Johnson found on exhibition in a showcase in a second-hand store, owned by one Neyman, a pair of pliers which he identified as his. He thereupon, aided by an officer armed with a search-warrant, searched the place and among a great variety of other similar articles found most of his tools. The name had been erased from them. The erasures were apparent. He also found a square belonging to Rude, and two handsaws belonging to Charles Johnson. These articles were all identified by the respective owners as among the lot of tools left by them together in the school building, and were exhibited to the jury. On the morning of July 3 the defendant went to Neyman's place and, finding Neyman's son in charge, told him that he had some tools to sell. Young Neyman told him that he would be down to his house on the next morning to examine them. The store was to be closed the next day because it was Sunday. Neyman went to the place according to agreement, and after some conversation bought the lot of tools for \$7.50 and took

them to the store. Since July 4, a legal holiday, fell on Sunday, the store was kept closed on Monday, July 5, also. Early in the morning of the next day the defendant came to the store and there received payment from Neyman, after signing a bill of sale. Dealers in second-hand goods are required by an ordinance of the city to take bills of sale for goods purchased by them, and to furnish copies of them, at the close of the day's business, to the city authorities. The defendant signed the name "John Johnson," designating his residence as "20 West Silver street," whereas he resided at 314 East Mercury street. When Neyman went to defendant's house to purchase the tools, they were all together in a box or chest, which, from the description given by him, was the same one in which they had been left in the school building on July 2. Neyman did not notice a name upon any of the tools. He did not include the box or chest in his purchase. The evidence as to the value of the tools, though not entirely satisfactory, is sufficiently substantial to justify the conclusion that they were all together worth at least \$35. None of the witnesses for the state had any knowledge as to how or by whom the tools were taken from the school building, or how they came into the possession of the defendant.

The defendant was examined as a witness in his own behalf. He stated that he had received the tools on June 28 from a man by the name of Thornton, who lived next door to him on Mercury street; that Thornton was employed doing odd jobs in the neighborhood, and on that particular day was engaged at some carpenter repair work for a man by the name of Kipp, across the street; that Thornton had tools of his own; that after Thornton had finished work he came to him and asked for and obtained from him a loan of five dollars, leaving the tools as security; that the tools were then in the chest or box, but, knowing that Thornton had tools worth from ten to fifteen dollars, he did not examine them; that he had previously lent Thornton money on the same tools; that he was sure he received the tools on June 28, because, when Thornton had finished the work for Kipp, Kipp had paid him, taking his receipt which bore that

date, Kipp having shown him the receipt; that on the next day he again saw Thornton, who desired an additional loan of two dollars, which he refused; that Thornton thereupon told him he might keep the tools, inasmuch as he was going away to work in an adjoining county; that the sale was made to Neyman on July 3; that he signed the bill of sale on July 6 as Neyman directed, both as to name and residence; that Neyman knew that he would not sign his own name, and hence the direction to do as he did. He stated further that as soon as he had signed the name to the bill of sale, Neyman complained that he was having trouble about tools, but did not say whether he referred to the tools in question or not. Being asked to explain to the jury why he had written the name "Johnson" when his own name was Moxley, he said: "I didn't want my name along there with a lot of thieves, any more than any of these gentlemen do; that is why I put it there."

It appeared from the testimony of other witnesses that Thornton did reside in the neighborhood of defendant's residence up until the day defendant purchased the tools from him, and that he was engaged in doing odd jobs at carpenter repairing and similar work. Though Kipp was examined as a witness to establish the previous good character of the defendant, he was not asked to produce the receipt referred to by the defendant, nor was he questioned about it. At the time the defendant signed the bill of sale, Neyman was busy and did not notice how it was signed, until he came to make out his report to the city authorities of the purchases made during the day. Neyman had known defendant for some time and knew where he resided.

Section 8662, Revised Codes, under which the information was drawn, declares: "Every person who for his own gain or to prevent the owner from again possessing his own property buys or receives any personal property, knowing the same to have been stolen, is punishable by imprisonment in the state prison not exceeding five years or in a county jail not exceeding six months." To make out the substantive offense herein defined and denounced, the evidence must establish (1) that the prop-

erty in question was stolen; (2) that the defendant bought it or received it knowing it to have been stolen; and (3) that he did so for his own gain or to prevent the owner from regaining possession of it. While the evidence summarized above is entirely circumstantial, we think it made out a case upon which the jury could properly find the presence of every essential element of the offense. (*State v. Sparks*, 40 Mont. 82, 105 Pac. 87; *Boyd v. State*, 150 Ala. 101, 43 South. 204; *People v. Schooley*, 149 N. Y. 99, 43 N. E. 536; *Licette v. State*, 75 Ga. 253; *Gunther v. People*, 139 Ill. 526, 28 N. E. 1101; *People v. Pitcher*, 15 Mich. 397; *State v. Goldman*, 65 N. J. L. 394, 47 Atl. 641; *Commonwealth v. Billings*, 167 Mass. 283, 45 N. E. 910; *State v. Gordon*, 105 Minn. 217, 117 N. W. 483, 15 Ann. Cas. 897.) It wholly fails, however, to establish the ownership as alleged in the information. In larceny it is necessary that the charge identify the offense by a description of the things stolen, and their ownership. The name of the owner must be stated, if known. (2 Bishop's New Criminal Procedure, sec. 718.) So in charging the offense of receiving stolen property. (Id., secs. 982, 983; *Miller v. People*, 13 Colo. 166, 21 Pac. 1025; *State v. McAloon*, 40 Me. 133; *Commonwealth v. Finn*, 108 Mass. 466; 34 Cyc. 521.) The reason of the rule is that the transaction may be so identified that the defendant may, by proper plea, protect himself against another prosecution for the same offense. It follows that the ownership must be proved as charged. (*Commonwealth v. Billings*, *supra*; *Miller v. People*, *supra*; *Brooks v. State*, 5 Baxt. (Tenn.) 607; *Bryan v. State*, 54 Tex. Cr. 59, 111 S. W. 1035; 34 Cyc. 523.)

The ownership laid in the information in this case is jointly in E. G. Johnson, Charles Johnson and C. M. Rude. The evidence discloses that all the tools stolen belonged to E. G. Johnson, except two saws identified as the property of Charles Johnson, and a square belonging to Rude. The judgment, if allowed to stand, would not support a plea of former conviction under a charge of having received the tools owned exclusively by either of the Johnsons or Rude. While, under the

statute (Revised Codes, sec. 9153), a mistake in the name of the person injured is not to be deemed material, if the injury is so described in other respects as to identify it (*People v. Leong Quong*, 60 Cal. 107; *State v. Green*, 15 Mont. 424, 39 Pac. 322), yet if it is not so identified by the evidence as that it can be said to be the same, there is such a variance as amounts to a failure of proof, and the conviction cannot be sustained. (*State v. McDonald*, 10 Mont. 21, 24 Am. St. Rep. 25, 24 Pac. 628; *State v. Lee*, 33 Mont. 203, 83 Pac. 223.) If the information had charged the different articles to be the separate property of the respective owners, the information would have come within the rule of *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87, and the conviction would have been proper. As it stands, it does not identify the transaction, except by the allegation of joint ownership (the description of the property being entirely omitted because unknown to the county attorney), and hence must be held not to identify with sufficient certainty the transaction which the evidence tends to establish.

The contention is also made that the evidence is insufficient, in that it fails to establish the value of the property as alleged. There is no merit in this contention. The statute does not require the value to be alleged, and it is sufficient to charge the offense as it is therein defined. The penalty does not depend upon the value; hence it need not be alleged. (*People v. Rice*, 73 Cal. 220, 14 Pac. 851; 2 Bishop's New Criminal Procedure, sec. 985; 34 Cyc. 521.) Not only so, but it is not necessary that the evidence go further than to demonstrate that the property has some value. (34 Cyc. 529.) The allegation in the information on this subject may be regarded as surplusage.

Contention is made that the court erred in admitting certain evidence as tending to show that the defendant had at other times received other articles which had been stolen, as reflecting upon the question of his guilty knowledge of their character when he purchased the tools in question. It is conceded that evidence of similar transactions prior to July 3 would have been admissible for the purpose for which this was offered; but that

this was incompetent, because it had reference to transactions subsequent to that date. If such were the fact, the objection ought to have been sustained; for his dealings with thieves after that date would not reflect upon the question whether the defendant had knowledge that he was then dealing with a thief. But it appears that all the transactions referred to occurred during the month of June. The evidence was open to the objection, however, that it was wholly immaterial in that it did not tend to show that any of the articles in question had been stolen. On another trial the evidence should be excluded, unless it is made to appear that the articles were in fact stolen.

The judgment is reversed, and the district court is directed to grant the defendant a new trial.

Reversed and remanded.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH did not hear the argument, and takes no part in the foregoing decision.

TOWNSEND, RESPONDENT, v. CITY OF BUTTE, APPELLANT.

(No. 2,834.)

(Submitted June 7, 1910. Decided June 15, 1910.)

[109 Pac. 969.]

Cities and Towns—Sidewalks—Failure to Remove Snow and Ice—Personal Injuries—Complaint—Sufficiency—Evidence—Hypothetical Questions—Contents—Instructions.

Cities and Towns—Defective Sidewalks—Accumulation of Snow and Ice—Complaint—Sufficiency.

1. The complaint in an action against a city which, among other things, alleged that defendant had permitted snow and ice to accumulate on a sidewalk, thus forming a smooth, slippery and slanting surface, dangerous to pedestrians; that, after due notice, it had failed to remove the same or to put a warning signal at the dangerous place; and that by reason of said negligence and carelessness plaintiff slipped and fell, receiving the injuries complained of, was

sufficient, as against a general demurrer, to show negligence on the part of the city and its causal connection with plaintiff's injuries.

Same—Personal Injuries—Liability of City.

2. A city is liable in damages for injuries occasioned by its failure to remove from a sidewalk under its control snow and ice which had accumulated from natural causes and formed a smooth, slippery and slanting surface over which it was dangerous for pedestrians to travel, which condition was permitted to remain for an unreasonable period of time after it had actual or constructive notice thereof.

Evidence—Hypothetical Questions—Contents.

3. A hypothetical question need not comprehend all the evidence on the subject to which the question relates.

Personal Injuries—Contributory Negligence—Instructions Relative to—When Unnecessary.

4. An instruction relative to contributory negligence in a personal injury case was properly refused where there was neither a plea nor any evidence upon the subject.

Instructions—When Refusal Proper.

5. The refusal of an instruction, the subject matter of which was covered by one given, was not error.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Marguerite Townsend against the city of Butte. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

In behalf of Appellant, there was a brief by *Mr. Edwin M. Lamb, Mr. John R. Boarman, and Mr. N. A. Rotering*, and oral argument by *Mr. Rotering*.

The allegation charging the defendant city with negligence is not sufficient to state a cause of action. It fails to state whether the plaintiff fell by reason of the snow on the ice, or by reason of the slipperiness of the ice, or whether it was caused by the ice being slanting or smooth. (See *Bretsh v. Toledo*, 1 Ohio, 210; *Bodah v. Deer Creek*, 99 Wis. 509, 75 N. W. 75; *City of Hammond v. Winslow*, 33 Ind. App. 92, 70 N. E. 819; *City of Logansport v. Kihn*, 159 Ind. 68, 64 N. E. 595; 20 Ency. of Law, 78, and cases cited.) Unless the ice or snow has accumulated so as to form ridges or to become so uneven or rounded as to form an obstruction, a municipality is not liable.

Under the facts as shown by the evidence the plaintiff was not entitled to recover. (See *Calder v. City of Walla Walla*, 6

Wash. 377, 33 Pac. 1054; *Harrington v. City of Buffalo*, 121 N. Y. 147, 24 N. E. 186; *Henkes v. City of Minneapolis*, 42 Minn. 530, 44 N. W. 1026; *Hausmann v. City of Madison*, 85 Wis. 187, 39 Am. St. Rep. 834, 55 N. W. 167, 21 L. R. A. 263; *Taylor v. City of Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492, 11 N. E. 642; *McDonald v. Toledo*, 63 Fed. 60.) The evidence shows that it thawed in the afternoons and froze at nights and caused the water to flow over the streets and sidewalk; the evidence further shows that that same condition existed, not only on West Quartz street, but over the entire city. It was brought on by natural causes and the city should not be held liable. (*Aurora v. Parks*, 21 Ill. App. 459; *Greenlaw v. Milliken*, 100 Me. 440, 62 Atl. 145; *Broburg v. City of Des Moines*, 63 Iowa, 523, 50 Am. St. Rep. 756, 19 N. W. 340.)

In behalf of Respondent, there was a brief by *Messrs. Roote & Murray*, Mr. James E. Healy, and Mr. A. C. McDaniel, and oral argument by Mr. J. E. Murray.

The complaint was sufficient. (See *City of Franklin v. Davenport*, 31 Ind. App. 648, 68 N. E. 907; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.)

In *Collins v. Council Bluffs*, 32 Iowa, 328, it is held that it was actionable negligence for the city to permit an obstruction in a street from snow and ice deposited from natural causes. (See, also, *Bull v. Spokane*, 46 Wash. 237, 89 Pac. 555, 13 L. R. A., n. s., 1105; *Gaylord v. New Brittain*, 58 Conn. 398, 20 Atl. 365; *Magaha v. Hagerstown*, 95 Md. 62, 93 Am. St. Rep. 317, 51 Atl. 832; *Nebraska City v. Rathbone*, 20 Neb. 288, 29 N. W. 920; *Dooley v. City of Meridan*, 44 Conn. 117, 26 Am. Rep. 433.) Even some of the courts which hold that mere slipperiness is not a defect depart from the slippery doctrine when there are accumulations of ice and snow so as to form an obstruction. (*Todd v. Troy*, 61 N. Y. 506; *Walsh v. Buffalo*, 44 N. Y. Supp. 942; *Goff v. Little Falls*, 20 N. Y. Supp. 175.) The rule requiring a city to exercise ordinary care to keep its sidewalks reasonably safe for ordinary purposes of travel includes the re-

moval of accumulations of ice and snow, and the city is liable for injuries received because of its negligence. (*Hall v. City of Lowell*, 10 Cush. 260; *Templin v. Boone*, 127 Iowa, 91, 102 N. W. 789; *Street v. Holyoke*, 105 Mass. 82, 7 Am. Rep. 500.) Courts which approve the smooth surface doctrine hold that such facts as here set out constitute a defect, and that the city is liable even though the surface of the ice is smooth and slippery, basing their decision on the ground that the city was negligent in permitting an accumulation of ice and snow to arise from such cause, which accumulation is dangerous to ordinary travel. (*Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231; *Hughes v. Lawrence*, 160 Mass. 474, 36 N. E. 485; *Navarre v. Benton Harbor*, 126 Mich. 618, 86 N. W. 138; *Shumway v. Burlington*, 108 Iowa, 425, 79 N. W. 123.) Whenever an accumulation of ice is allowed to remain on a sidewalk an unreasonable length of time in an unsafe condition, the city is liable regardless of the source of the ice. (*Todd v. Troy*, *supra*; *Foxworthy v. Hastings*, 25 Neb. 133, 41 N. W. 132; *Smith v. Chicago*, 38 Fed. 388; *Shumway v. Burlington*, 108 Iowa, 425, 79 N. W. 123; *Nebraska City v. Rathbone*, 20 Neb. 288, 29 N. W. 920; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *McLaughlin v. Corry*, 77 Pa. 109, 18 Am. Rep. 432; *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906; *McDonald v. Ashland*, 78 Wis. 251, 47 N. W. 434; *Klaus v. Buffalo*, 86 App. Div. 221, 83 N. Y. Supp. 620.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The plaintiff recovered judgment, and the city has appealed from the judgment and from an order denying it a new trial.

It is first contended that the complaint does not state facts sufficient to constitute a cause of action. In their brief counsel for the city say: "A careful reading of the complaint will disclose the fact that it fails to state whether the plaintiff fell by reason of the snow on the ice, or by reason of the slipperiness

of the ice, or whether it was caused by the ice being slanting or smooth." In the district court a demurrer was interposed to the complaint, but it did not raise or suggest the infirmity pointed out above. Had it done so, possibly it should have been sustained. But the special demurrer which was interposed was properly overruled, and we are now left to say whether the complaint is sufficient to withstand a general demurrer.

The negligence charged in the complaint consists in: (a) Permitting ice and snow to accumulate on the sidewalk at the point where the injury occurred, forming a smooth, slippery, and slanting surface dangerous to pedestrians; (b) failing to remove the same after due notice; and (c) failing to place a warning signal at the dangerous place. The complaint charges: "That by reason of the said negligence and carelessness of the said city of Butte, this plaintiff, on the eleventh day of December, 1903, while lawfully traveling and walking on said sidewalk at a point on the south side of West Quartz street about fifteen feet west of North Montana street, slipped and fell thereon." This allegation is followed by a recital of the injuries received by the plaintiff and the resulting damages which she sustained. As against a general demurrer, we think this complaint sufficiently shows the negligence of the city and its causal connection with the plaintiff's injuries. (*Fearon v. Mullins*, 38 Mont. 45, 98 Pac. 650; *City of Franklin v. Davenport*, 31 Ind. App. 648, 68 N. E. 907.)

Much consideration is given in both briefs to the question: Is a city liable for damages for injuries occasioned by mere slipperiness of a sidewalk caused by snow or ice? But that question was answered in the negative by the trial court in its instruction No. 14a, and is not before us now. Rather the question which this record suggests is: Can a city be held liable for damages for injuries occasioned by its failure to remove from a sidewalk under its control snow and ice which have accumulated and formed on the sidewalk a smooth, slippery, and slanting surface over which it is dangerous for pedestrians to travel, when such condition is permitted to remain for an unreasonable time

after the city has actual or constructive notice thereof? After reviewing the decided cases at great length, Thompson, in his Commentaries on the Law of Negligence (section 6191) says: "Coming back to the sound and sensible doctrine on this subject, we find that it has been held, by a court whose decisions upon this subject are in general to be commended, that ice and snow accumulating on a sidewalk from natural causes, *if suffered to remain* until the surface is so rough, ridged, rounded, or slanting that it is difficult and dangerous for persons traveling on foot to pass over it when exercising ordinary care, constitute a defect for which the city or town is liable, provided it has notice of its dangerous condition." In *Storm v. City of Butte*, 35 Mont. 385, 89 Pac. 726, this court held that, where ice and snow are permitted by the municipal authorities to accumulate on a sidewalk and to become rough and uneven so as to render it difficult and dangerous for pedestrians to pass over it, such a condition creates an obstruction to travel, and for injuries occasioned thereby the city is liable. We do not see any difference in principle between that case and the one now before us.

The evidence tends to show that for some distance west from the intersection of Montana and Quartz streets along the sidewalk, on the south side of Quartz street, water from melting snow had run down on to the walk, had frozen, and, by reason of continued freezing and thawing, the ice had accumulated to a thickness of four or five inches upon the outer edge of the walk and, gradually decreasing in thickness toward the inner edge, disappeared altogether, leaving a narrow pathway along the inner edge upon which there was not any ice; that this condition had prevailed for many days before plaintiff's injury; that the city authorities had actual notice of the condition, as well as the opportunity for knowledge by reason of the lapse of time; that on the day in question a light snow had fallen, covering the clear pathway as well as the portion of the walk upon which the ice had accumulated; that, while plaintiff was passing along and over this particular portion of the walk, she

stepped upon the slanting ice, her feet slipped from under her, and she fell and sustained severe injuries. The evidence tends to show due care on the part of plaintiff, and we think is amply sufficient to make out a case for the jury, upon the theory that if the ice is permitted to accumulate upon the walk and to form a smooth, slippery surface at an angle or slanting to the plane surface of the walk, so that it becomes difficult and dangerous for pedestrians to pass over it while exercising ordinary care, then the city is liable for injuries caused by such obstruction to travel, provided it had actual knowledge of the condition, or by reason of lapse of time ought to have knowledge of it, and fails, after such knowledge, to remove the obstruction within a reasonable time. (*Huston v. City of Council Bluffs*, 101 Iowa, 33, 69 N. W. 1130, 36 L. R. A. 211.)

Objection was made by the city to a hypothetical question propounded to Dr. Hanson, and a motion was made to strike out the answer given by him. The objection and motion were overruled. The ground upon which error is now predicated is that the question "did not contain all the undisputed facts in the case." In *State v. Crowe*, 39 Mont. 174, 102 Pac. 579, this court held that a hypothetical question need not comprehend all the evidence upon the subject to which the question relates.

Instruction 15a, requested by the city and refused by the court, was properly refused. There was not any plea nor any evidence of contributory negligence.

The subject matter of instruction No. 21a, requested by the city, is fully covered in instruction 14a, given.

We do not find any reversible error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH did not hear the argument, and takes no part in the foregoing decision.

SCHAEFFER, RESPONDENT, v. MILLER, APPELLANT.

(No. 2,832.)

(Submitted June 20, 1910. Decided June 27, 1910.)

[109 Pac. 970.]

Quasi Contracts—"Obligation"—Statute of Limitations.

Contracts—"Quasi Contracts"—Definition.

1. Where one has received money which, though not bound to do so by express contract, he in equity and good conscience ought to turn over to him from whom he received it, the law implies a promise on his part to that effect, and the obligation, thus created or implied by law, is termed a "quasi contract," as distinguished from a contract as defined in sections 4965 and 4966, Revised Codes.

Same—Not Founded on Writing—"Obligation"—Statute of Limitations.

2. Pending a deal for the purchase of real property, plaintiff paid to defendant \$5,000 on the purchase price. Before the negotiations had ripened into a contract they failed, and defendant returned \$4,000 of the money paid, but refused to turn over the balance. There was not any agreement between them that all the money should be returned to the prospective purchaser in case the transfer was not made. The action to recover the balance of \$1,000 was not brought until more than three years had elapsed after payment of the money to defendant. *Held*, that the action was one upon an "obligation," within the meaning of subdivision 3 of section 6447, Revised Codes, which provides that an action upon an obligation, not founded upon an instrument in writing other than a contract, etc., must be commenced within three years, and hence was barred under said section.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Lincoln H. Schaeffer against Thomas B. Miller. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Messrs. Carpenter, Day & Carpenter submitted a brief in behalf of Appellant. *Mr. B. P. Carpenter* argued the cause orally.

In behalf of Respondent, there was a brief by *Messrs. Walsh & Nolan* and *Messrs. Clayberg & Horsky*. *Mr. T. J. Walsh* argued the cause orally.

This action is not claimed by respondent to be based on a contract of sale or a failure to carry out its terms, but is purely a

cause of action for money had and received by appellant, belonging in equity and good conscience to respondent, because of a total failure of the consideration upon which it was paid. We are suing upon a new contract which the law implies upon the abandonment of the negotiations for the contract of sale, namely, that whenever one has in his hands money which in equity and good conscience belongs to another, the law implies a promise to pay the same to such other.

This implied contract does not grow out of the negotiations between respondent and the owner of the property through appellant as its agent, but is wholly independent thereof. It makes no difference in law how the money came into the hands of appellant, in so far as the implied promise to repay is concerned, and the court, in determining the liability of appellant to repay, need not consider the means or methods by which appellant received this money. (See *Duncan v. Grisborn*, 17 Utah, 209, 53 Pac. 1044; *Pressnell v. Lundin*, 44 Minn. 551, 47 N. W. 161; *Richter v. Union Land &c. Co.*, 129 Cal. 367, 62 Pac. 39; *Rose v. Foord*, 96 Cal. 152, 30 Pac. 1114; *Fuel Co. v. Tuck*, 53 Cal. 304; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774.)

If there is any doubt in the mind of the court as to which section of the statute of limitations is applicable, that of the longer term should be applied. (25 Cyc. 1068; *Crum v. Johnson*, 3 Neb. (Unof.) 826, 92 N. W. 1054.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Immediately prior to June 20, 1905, the Mutual Benefit Life Insurance Company of New Jersey owned the Denver Block in the city of Helena. T. B. Miller, this appellant, was a special agent for the insurance company, and, through him, L. H. Schaeffer, the respondent, entered into negotiations for the purchase of the property. These negotiations were apparently proceeding so favorably that Schaeffer paid over to Miller \$5,000 as a part of the purchase price on the property; but about June 20 the negotiations failed before a contract had been entered

into, and Schaeffer thereupon demanded the return of his money. Miller repaid him \$4,000, but refused to pay the balance, and this action was commenced to recover the \$1,000 remaining unpaid. The complaint was filed April 19, 1909. In addition to other defenses, the answer pleaded the bar of the statute of limitations. At the close of the plaintiff's case upon the trial in the district court, the defendant moved for a nonsuit, and specified as one of the grounds of the motion that the cause of action was barred by the provisions of subdivision 3 of section 6447, Revised Codes. This motion was denied. The trial resulted in a verdict and judgment in favor of the plaintiff, from which judgment the defendant appealed.

Upon substantially the same evidence as presented in this record, we held, in *Schaeffer v. Mutual Benefit Life Ins. Co.*, 38 Mont. 459, 100 Pac. 225, that Miller did not have any authority, actual or ostensible, to accept the \$5,000 pending negotiations for a contract of sale. The present action proceeds upon the theory that, since Miller did actually receive the money which belonged to Schaeffer, and the negotiations failed before any contract of sale was ever entered into, in equity and good conscience, Miller should return the entire amount of \$5,000. There is not any dispute as to the character of action or of the right of plaintiff to maintain it if brought within time. The action was brought more than three years and less than five years after the money was paid over to Miller and a demand for its return made by Schaeffer. At common law this would be treated as an action of implied *assumpsit* for money had and received by the defendant to the use and benefit of plaintiff; and while our Code has abolished the forms of action, the principles underlying them are frequently applied in determining the rights and remedies of litigants.

Prior to 1903 our statute of limitations provided that an action upon a contract, obligation, or liability founded upon an instrument in writing must be commenced within eight years (section 512, Code of Civil Procedure of 1895); while an action upon a contract, account, promise, obligation or liability not

founded upon an instrument in writing must be commenced within three years (section 514). By section 513 certain other actions were required to be brought within five years. In 1903 sections 513 and 514 above were amended (Laws of 1903, page 292, Chapter 128), and the amended sections were brought forward into the Revised Codes as sections 6446 and 6447 respectively. Section 6446 provides that an action upon a contract, account, or promise not founded upon an instrument in writing, must be commenced within five years. Section 6447 provides: " * * * 3. An action upon an obligation or liability, not founded upon an instrument in writing other than a contract, account or promise," must be commenced within three years. The only question presented by this appeal is: Which of the above provisions is controlling in this action? If the former, the action was brought in time; if the latter, the action was barred at the time the complaint was filed.

The answer to the question above stated is to be found in the answer to the other question: Is this an action upon a contract, or upon an obligation? Respondent contends that it is an action upon a contract, within the meaning of that word as used in section 6446 above; on the contrary, the appellant contends that it is an action upon an obligation as that word is used in section 6447, and must have been brought within three years, and, as it was not, it is barred. There was not any agreement between Miller and Schaeffer that Miller should return the money if the negotiations failed, or at all. There was not any meeting of minds and not any consideration; therefore there was not any "contract," as that term is generally understood. But Miller received money which in equity and good conscience he ought to turn over to Schaeffer, and upon this fact alone the law implies a promise on his part to do so; and this obligation of his, created or implied by law, is termed by the courts and law-writers a *quasi* contract—a contract implied by law, or a constructive contract. It is a pure legal fiction; it lacks two of the essential elements of a contract, as defined in sections 4965 and 4966 of the Revised Codes, and as generally understood.

In treating of *quasi* contracts or contracts implied by law, as distinguished from contracts implied in fact, the supreme court of Pennsylvania, in *Hertzog v. Hertzog*, 29 Pa. 465, a leading case upon the subject, says: "In one case, the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other, it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty. We have, therefore, in law three classes of relations called contracts: (1) Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied. (2) Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract. (3) Express contracts."

In *Sceva v. True*, 53 N. H. 627, it is said: "Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an *actual* contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the *obligationes quasi ex contractu* of the civil law, which seem to lie in the region between contracts on the one hand, and torts on the other, and to call for the application of

a remedy not strictly furnished either by actions *ex contractu*, or actions *ex delicto*. The common law supplies no action of duty, as it does of *assumpsit* and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of *assumpsit* where there is no true contract, and no promise to support it."

Emphasis is laid by respondent upon the fact that at common law the action of *assumpsit* was employed to enforce redress for the breach of a *quasi* contract, and at first blush this might appear to be a reason of some cogency for asserting that the subject matter of such action must be a contract; but the fact is that the classification of civil actions under the common law, as those arising from (1) torts, and (2) contracts, was not sufficiently comprehensive to include an action arising from the mere breach of duty, such as is presented by the case before us, and, to prevent a failure of justice, the courts at common law accommodated this right of action to the form of action called "*assumpsit*," by creating the legal fiction of a promise where there was not any in fact. The right of action for a breach of duty had for its foundation the maxim "*Ex aequo et bono*," and because the common-law counts partook of the nature of equitable remedies, they were deemed most appropriate to this right of action, not because it was founded upon a contract, but because it was of an equitable nature; and this mythical creation of the law, called a *quasi* contract, was adopted for the purpose of enforcing a legal duty by an action in form *ex contractu* (15 Am. & Eng. Ency. of Law, 2d ed., 1078; *Hertzog v. Hertzog*, above), but in reality in the nature of a bill in equity (15 Am. & Eng. Ency. of Law, 2d ed., 1098). At common law, substantive law was largely an appendix or supplement to the law of procedure; and it was for the very purpose of making applicable the form of action in *assumpsit* that the common law created this fiction of a promise. (2 Page on Contracts, sec. 771.)

Speaking of *quasi* contracts in 9 Cyc. 243, it is said: "These obligations, however, are not contract obligations at all in the

true sense, for there is no agreement; but they are clothed with the semblance of contract for the purpose of the remedy. They are described by the term '*quasi*' or 'constructive' contracts."

In *Moses v. Macferlan*, 2 Burr. 1005, which was an action *in indebitatus assumpsit* upon the common count for money had and received upon a *quasi* contract, Lord Mansfield, speaking for the court in approval of the form of action adopted, said: "This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono* the defendant ought to refund."

Of the application of the common counts to an action upon a *quasi* contract, the supreme court of Alabama, in *Barnett v. Warren & Co.*, 82 Ala. 557, 2 South. 457, remarks: "A suit for money had and received is in the nature of an equitable action, and is maintainable whenever one person has money which, *ex aequo et bono*, belongs to another (3 Brickell's Digest, 51, secs. 10, 11, 13); and it is not always necessary that actual money shall have been received. If the property, or anything else, be received as the equivalent of money, by one who assumes to cancel or dispose of a property right, for which, by contract, or liability, legal or equitable, it is his duty to account to another, the latter may treat the transaction as a receipt of money, and sue for it as such."

In *Camp v. Tompkins*, 9 Conn. 545, the court said: "This action for money had and received is in [the] nature of a bill in equity, and the gist of the action is, that the party is obliged by the ties of equity and natural justice to refund the money."

In 2 Greenleaf on Evidence, thirteenth edition, section 117, it is said: "The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may in general be proved by any legal evidence, showing that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff." This text is quoted with approval in *Davis v. Krum*, 12 Mo. App. 279.

So that, after all, the fact that an action *ex contractu* has been utilized for the enforcement of rights growing out of *quasi* contracts is of little significance in attempting to determine whether such an action is in fact upon a contract. There is not any reason for applying the term "*quasi* contract" to the relationship existing between plaintiff and defendant in any of these cases. Had the courts and text-writers described the relationship by the simple term "duty," the profession and litigants would have been saved much confusion and needless annoyance. But the same legislature which adopted section 514, Code of Civil Procedure of 1895, above, also adopted sections 2090 and 2091, and sections 1920 and 1921, Civil Code of 1895 (sections 4965, 4966, 4892, and 4893, Revised Codes). These sections read as follows:

"Sec. 2090. A contract is an agreement to do or not to do a certain thing.

"Sec. 2091. It is essential to the existence of a contract that there should be: 1. Parties capable of contracting. 2. Their consent. 3. A lawful object; and 4. A sufficient cause or consideration."

"Sec. 1920. An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.

"Sec. 1921. An obligation arises either from: 1. The contract of the parties; or, 2. The operation of law. * * *

These sections are quoted literally from the Field New York Code of 1865. It is only reasonable to presume that the legislature which adopted the Codes of 1895, used the term "contract," in section 514, as defined and analyzed by it in sections 2090 and 2091 above, and likewise used the term "obligation" as defined by it in sections 1920 and 1921 above. If this be true, and it is scarcely open to doubt, then there never was a contract between Miller and Schaeffer for the return of this money, and an action to enforce the return of it is not an action upon a contract as defined in the Codes or as used in the statute of limitations. But the duty to return the money is the very foundation of the action, and the relationship of Miller to

Schaeffer is properly characterized by the term "obligation" or legal duty; and this present action is one to enforce a duty created by law from the very right and justice of Schaeffer's demand, and is an action upon an obligation, not founded upon an instrument in writing, as that term is used in the statute of limitations. Such an action must be brought within three years from the time the cause of action accrues; and, as this action was not brought within the time limited by the statute, the cause of action was barred, and the court erred in refusing to grant the nonsuit. This conclusion does not conflict in the least with the decision of this court in *Galvin v. Mac. M. & M. Co.*, 14 Mont. 508, 37 Pac. 366. The right of a litigant in certain cases to waive a tort and sue as in *assumpsit* is recognized by the authorities generally; but, by amending section 514 above, it can hardly have been intended by the legislature that such election of remedies should operate to give the plaintiff two years' additional time within which to assert his right.

The plea of the bar of the statute of limitations is one recognized by law. Statutes of limitations are the creatures of legislation, and are enacted for the express purpose of being utilized, to the end that one may not be harassed by litigation after a reasonable time has elapsed, and proof, which might otherwise have been available, may have been lost. They are essentially statutes of repose. The defense having been interposed in this action, it should have prevailed.

The judgment is reversed, and the cause is remanded to the district court, with direction to set aside the judgment heretofore entered, and enter judgment in favor of the defendant for his costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

41 428
41 491

CASSIDY, RESPONDENT, v. SLEMONS & BOOTH, APPELLANT.

(No. 2,862.)

(Submitted June 23, 1910. Decided June 30, 1910.)

[109 Pac. 976.]

Money Lent—Complaint—Sufficiency—Demand—When Unnecessary—Appeal—Burden of Showing Error—Offer of Proof.**Complaint—Sufficiency—How Tested.**

1. In testing the sufficiency of a complaint when attacked by general demurrer or by any other means of raising the question, the court will not confine itself to determining whether it states a cause of action for the particular relief prayed for, but if upon any view the plaintiff is entitled to relief, the pleading will be sustained.

Money Lent—Complaint—Demand.

2. Plaintiff alleged in her complaint that she loaned a specified sum of money to defendant company, for which a receipt was issued to her; that none of the principal and only part of the interest had been repaid, etc. *Held*, that the complaint was sufficient to warrant recovery for money lent; that the allegation that defendant gave a receipt to plaintiff did not convert the action into one to recover upon a certificate of deposit, so as to make the pleading insufficient for failure to allege a demand; but that such allegation was a pleading of evidence, and therefore immaterial.

Same—Demand—When Unnecessary.

3. The general rule that where money is to become due only after demand, it is necessary for plaintiff to allege, and prove, that this requirement had been met, does not apply where defendant denies all liability. Under such circumstances a demand would be useless, and hence is not required by law.

Appeal—Presumptions—Burden of Showing Error.

4. On appeal the presumption obtains that the trial court did not commit error. The burden, therefore, rests upon appellant to show that error was in fact committed.

Same—Exclusion of Evidence—Absence of Offer of Proof.

5. Where the testimony of a witness was presented in the record in narrative form, and there appeared therein not any question or offer of proof to suggest what evidence the witness might have given in reply to an interrogatory, the answer to which was excluded, the supreme court will not determine whether the trial court erred in its ruling.

Same—Exclusion of Evidence—Error Cured by Subsequent Admission.

6. Error in excluding evidence is cured by the subsequent admission of testimony eliciting substantially the information sought in the first instance.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Charlotte Cassidy against Slemons & Booth. From a judgment for plaintiff, and an order denying it a new trial, defendant corporation appeals. Affirmed.

Messrs. McBride & McBride, and *Messrs. Kremer, Sanders & Kremer*, submitted a brief in behalf of Appellant. *Mr. J. Bruce Kremer* argued the cause orally.

Mr. Jesse B. Roote, and *Mr. James E. Murray*, submitted a brief in behalf of Respondent. *Mr. Roote* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

After setting forth that the defendant is a corporation, the complaint in this action alleges: “(2) That the plaintiff herein, Charlotte Cassidy, on September 15, 1905, loaned to the defendant corporation the sum of two thousand (\$2,000) dollars in cash, for which the said defendant made, executed and delivered to the plaintiff its receipt or certificate of deposit in words and figures as follows, to-wit:

“ ‘Butte, Montana, Sept. 15, 1905.

“ ‘Received of Mrs. Cassidy two thousand dollars on account cash deposit.

“ ‘\$2,000.

“ ‘SLEMONS & BOOTH,

“ ‘By E. F. BOOTH.’ ”

It is then alleged that the defendant agreed to pay interest on the money thus loaned, at the rate of one per cent per month; that no part of the principal has been repaid, and no interest has been paid since June 15, 1907.

The amended answer admits that the defendant is a corporation; that it executed and delivered to plaintiff the receipt set forth above; and denies every other allegation of the complaint. By way of affirmative defense the answer sets forth that at all times mentioned in the complaint the defendant was engaged

in the real estate and loan business; that prior to September 15, 1905, the plaintiff had requested defendant to secure for her a loan of \$5,000 or any part thereof; that on September 15 the defendant submitted to plaintiff the application of one Charles Green to borrow \$2,000; that plaintiff approved the application, and directed the defendant to arrange the loan, which the defendant did, and notified the plaintiff, who thereupon deposited with the defendant the sum of \$2,000 to be loaned to Green, and defendant then executed and delivered to plaintiff the receipt mentioned above; that defendant delivered the money to Green, and thereafter, from time to time, acting as the agent of the plaintiff, it collected and turned over to her the interest; but before the commencement of this action the plaintiff personally took charge of the loan and thereafter collected the interest herself. It is then alleged, on information and belief, that the loan was fully paid and discharged by Green before this action was brought. Every material allegation of the affirmative defense is denied by reply.

The trial of the cause resulted in a verdict and judgment in favor of the plaintiff. Defendant has appealed from the judgment and from an order denying it a new trial. There is not any contention made that the evidence is not sufficient to sustain the verdict. It is admitted by counsel for appellant that the evidence upon every material issue is conflicting and irreconcilable. The specifications of error will be treated in the order made.

1. It is urged that the complaint does not state facts sufficient to constitute a cause of action, for the reason that it counts upon a certificate of deposit and does not allege a presentation or demand. If this theory is correct, defendant's conclusion is unavoidable. Section 5140, Revised Codes, provides: "A depository is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time." In *Stadler v. First National Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, this court held that a cause of action does not arise in favor of a depositor until demand and refusal, un-

less the depository has waived demand. If such demand is necessary, it follows as of course that it must be alleged in the complaint. But in testing the sufficiency of a complaint, when attacked by general demurrer or by any other means of raising the same question, the court will not confine itself to determining whether it states a cause of action for particular relief. Forms of action are abolished. The Code enjoins upon the plaintiff the duty to set forth the facts constituting his cause of action. In *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49, this court said: "If the facts stated in the body of the complaint entitle the plaintiff to *any* relief, a general demurrer will not lie, no matter what may be the form of the prayer." This was followed in *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976, where the court said: "The form in which an action is brought is of no consequence; nor does it matter that the complaint contains allegations not appropriate to the purpose sought to be attained. In determining the issue of law presented by a general demurrer to the complaint, or by any other appropriate method of raising the question—as here, by an objection to the admission of evidence at the trial, on the ground that the facts stated do not warrant any relief—matters of form will be disregarded, as well as allegations that are irrelevant or redundant; and, if upon any view, the plaintiff is entitled to relief, the pleading will be sustained." In speaking of the same rule, the court again, in *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988, said: "As the complaint was simply the basis or foundation of plaintiff's proof, if it contained allegations sufficient to enable him to introduce testimony showing a liability on the part of the defendants, and he could, in the absence of the specific allegations rest his case without proving the particulars in which the latter were negligent, then it seems to follow that, although he had made specific allegations of negligence, such allegations were immaterial, and should be disregarded."

Applying to the facts set forth in the complaint above the rule thus established in this state, and there cannot be any

question that it is sufficient to warrant recovery for money loaned by the plaintiff to the defendant. The allegation that the defendant gave to plaintiff the receipt copied above is immaterial—a pleading of evidence—and should be disregarded.

2. It is contended that there is a fatal variance between the allegations of the complaint and the proof offered by the plaintiff, in this: That, under plaintiff's theory, her complaint counts upon a loan for money due, while her evidence shows that the money was to be repaid to her only after sixty days' notice to defendant that she desired repayment.

It is a general rule that, where money is to become due only after notice or demand, it is necessary for the plaintiff to allege and prove that the required notice or demand was given or made; but to that rule there is this exception, which is as well recognized as the rule itself, namely: Where the defendant denies all liability upon the contract pleaded by the plaintiff, and it is apparent that a demand for payment would have been met by a refusal, a demand under such circumstances is not necessary, for the law does not require anyone to do a wholly useless thing. In *Thompson v. Whitney*, 20 Utah, 1, 57 Pac. 429, the rule, and the reason for it, are stated as follows: "The purpose of the rule which requires a demand before bringing suit in certain cases is to enable the party upon whom it is made to discharge his obligation, or perform his contract, without incurring the expense of a lawsuit. Where, then, as in the case at bar, the nature of the plaintiff's claim is such that a demand and refusal become a condition precedent to a recovery, and the defendant, in his answer, denies all liability under the alleged contract or obligation, he repudiates the same, so that it is apparent that a previous demand would have been met with a refusal, proof of such demand is not necessary; not even though alleged in the complaint. In such case a demand would be wholly useless, and the law never requires the performance of a useless thing. Therefore, the appellant, having in his answer disclaimed all liability, and entirely repudiated the respondent's claim, cannot be heard to object that no de-

mand was proven.” The authorities are cited in support of the doctrine, and of its correctness there cannot be any question. (*Judith Inland Transp. Co. v. Williams*, 36 Mont. 25, 91 Pac. 1061.) In fact, an analogous rule and exception are to be found in sections 4903 and 4904, Revised Codes, which read as follows:

“Sec. 4903. Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided in the next section.

“Sec. 4904. If a party to an obligation gives notice to another before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former.”

The defendant in this action not only denied any liability under the contract pleaded in the complaint, but repudiated the contract altogether; and the evidence shows that, long prior to the time this action was commenced, it likewise repudiated such agreement; so that it cannot now be heard to say that it was prejudiced in a substantial right, by reason of the failure of the plaintiff to make demand for repayment of money for which it disclaimed any liability whatever.

In *Board of County Commrs. v. American L. & T. Co.*, 75 Minn. 489, 78 N. W. 113, it was held that where the complaint alleged a demand, and the proof showed facts which rendered a demand unnecessary, there was not any substantial variance. The court said: “The variance, then, between the allegation of the complaint and the proof was one which the trial court could, and, if applied for, should, have remedied by allowing an amendment on the trial, or even after judgment, for the substantial rights of the defendants were not affected by the recep-

tion of the evidence.” Counsel for appellant in this case say in their brief: “So, in the case at bar, the plaintiff could have obtained leave of court to amend her complaint even after the motion for a nonsuit was made.” But they contend that, since plaintiff did not avail herself of the privilege of amending her complaint, advantage may be taken of the variance. But the very concession itself would indicate that counsel for appellant viewed the variance as one which might properly have been obviated by an amendment, and in this view we concur. Section 6585, Revised Codes, provides: “No variance between the allegation of a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.”

For the reasons given, we do not think it was necessary for plaintiff to prove a demand, and, if not, it follows that it was not necessary to plead it; and under the circumstances she might properly rely upon a cause of action for money due, and offer proof of facts which rendered a demand unnecessary. The resulting variance, if such it can be called, is certainly not a material one.

3. Upon the cross-examination of James Cassidy, husband of the plaintiff, while he was testifying as a witness for plaintiff, he was asked by counsel for defendant if he had not made certain statements to attorney W. I. Lippincott about a cause therefore pending in the district court, entitled “Charles Green v. The Crescent Loan Company.” This he denied. The defense called Mr. Lippincott as a witness, and he testified with reference to the case of Green v. Crescent Loan Company and the result in the district court, which was adverse to Green. Lippincott further testified: “I thought that the point decided by Judge Bourquin was erroneous, and would be reversed upon appeal to the supreme court. What Mr. Green explained to me about this matter is not testimony in this case, but, in pursuance of what I learned, I had several conversations with Mr. Cassidy about appealing the case—” At this point the witness was interrupted by an objection made by counsel for plain-

tiff, and the objection was sustained. It is insisted by counsel for appellant that the trial court erred in the ruling; that they were attempting to show that Cassidy had made the statements which on his cross-examination he denied making, and that the testimony sought to be elicited from the witness Lippincott was material, as reflecting upon the credibility of Cassidy, if for no other purpose. To the point where it was interrupted above, the evidence of this witness is given in the record in narrative form. There is not any question contained in the transcript which would suggest what evidence the witness Lippincott might have given, and there was not any offer of proof made; so that we cannot possibly say whether Lippincott's testimony, if completed, would or would not have been material. We do not presume that the trial court committed error. Appellant must assume the burden of showing that error was in fact committed; and upon this record, as presented, it has failed.

In *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297, this court said: "No offer to prove the facts sought to be elicited by the question was made; the excluded evidence is not before us; neither is it apparent from the question itself, and it is therefore impossible for this court to say whether there was error in the ruling of the trial court." And in *First National Bank of Portland v. Carroll*, 35 Mont. 302, 88 Pac. 1012, the same question was again presented and disposed of as follows: "The defendant was asked to state how the failure of the Wolff & Zwicker Iron Works to complete the pipe-line during the summer of 1900 could have made a shortage of water during the winter of 1901. An objection to the question was sustained, and error is assigned. There does not appear to have been any offer of proof made, and, as the question is not of such character that we can say that it appears what answer was sought, we are unable to determine whether the ruling of the court was correct or erroneous."

4. While a witness for plaintiff, James Cassidy testified that he had not seen, and did not know of the existence of, an assignment from Green to plaintiff of certain claims for wages. A

witness, Hudtloff, was called by the defendant, and asked: "Q. Well, do you know, of your own knowledge, whether James Cassidy or Charlotte Cassidy knew of the existence of this assignment?" An objection was made to the question in so far as it related to James Cassidy, and the objection was sustained. Error is now predicated upon the ruling, and it is insisted that it was very material to defendant to show that Cassidy was not testifying truthfully when he said that he did not know of the assignment. But from the question propounded to the witness it is impossible for us to say whether Hudtloff would or would not have contradicted or confirmed the testimony of Cassidy, and as there was not any offer of proof made, the rule announced above, in paragraph 3, is applicable. But if any error was committed at that stage of the proceedings, it was cured immediately thereafter, for, despite the court's ruling, the witness Hudtloff testified: "As to whether I know, of my own knowledge, whether Charlotte Cassidy knew of the existence of this assignment, well, to the best of my recollection—I don't remember the exact words that occurred between us, but I am inclined to think that Mr. Cassidy and Mrs. Cassidy were both up there and asked in regard to this assignment. The exact words of the conversation I can't recall, but, to the best of my recollection, they were both up there and inquired whether it would be all right or not—whether they would be protected for that amount." So that, after all, the defendant got before the jury substantially all that it could have elicited had the question been answered.

This disposes of the four assignments, which are the only ones made; and, upon the record, we do not think there was any reversible error committed.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

WELCH ET AL., APPELLANTS, v. NICHOLS, RESPONDENT.

(No. 2,849.)

(Submitted June 22, 1910. Decided June 30, 1910.)

[110 Pac. 89.]

***Brokers—Certificates of Stock—Contracts of Sale—Breach of—
Measure of Damages—New Trial Order—When Affirmed.*****New Trial Order—Appeal—Affirmance, When.**

1. Where an order granting a new trial does not disclose the particular ground upon which the court based its action, it will be affirmed if it can be justified upon any of the grounds properly laid in the motion asking a retrial.

Same—Conflicting Evidence—Appeal—Affirmance.

2. If on an appeal from an order granting a new trial it appears that the evidence presents a substantial conflict, the order will be affirmed (unless it expressly excludes the ground of insufficiency of the evidence), even though the moving party was not as a matter of right entitled thereto on any alleged error of law.

Same—Insufficiency of Evidence—Discretion.

3. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the discretion of the trial court; its action thereon will not be disturbed unless it is manifest that such discretion has been abused.

Brokers—Sale of Corporate Stock—Breach of Contract—Measure of Damages.

4. Where, after the breach of an agreement to purchase certain shares of stock from plaintiff brokers, under the terms of which defendants were bound to receive and pay for the same within a stipulated number of days, at which time title should pass, plaintiffs sold the stock in open market at the best available price, the measure of damages was the difference between the price fixed in the contract and the value of the shares to the seller—such value to be determined as provided in section 6081, Revised Codes.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Howard K. Welch and another, doing business as Welch & Harrington, against W. H. Nichols and another. There was a verdict and judgment for plaintiffs against defendant W. H. Nichols, and from an order granting him a new trial, plaintiffs appeal. Affirmed.

In behalf of Appellants, there was a brief by *Messrs. Mattison, Cavanaugh & Poore*, and oral argument by *Mr. J. A. Poore*.

Where evidence is conflicting, the jury's verdict will not be disturbed, unless clearly unsupported by the evidence before them. (*Kleinschmidt v. Dunphy*, 1 Mont. 124; *Frank v. Murray*, 7 Mont. 11, 14 Pac. 654; *Carron v. Wood*, 10 Mont. 506, 26 Pac. 388.) A new trial will not be granted if there is some testimony to support the verdict, although there is a preponderance of the evidence against it. (*Lincoln v. Rodgers*, 1 Mont. 220, 14 Morr. Min. Rep. 79; *Toombs v. Hornbuckle*, 1 Mont. 286; *Ming v. Truett*, 1 Mont. 322.) A new trial should not be granted for mere error, when it clearly appears that, had the error not been made, the result would have been the same. (*Edwards v. Wagner*, 121 Cal. 376, 53 Pac. 821; *Murphy v. Patterson*, 24 Mont. 591, 63 Pac. 380; *State v. Napton*, 24 Mont. 451, 62 Pac. 686.)

The by-laws constituted a contract between the members of the exchange, by which they were alike shielded and bound, and so long as they are not repugnant to some principle of public policy or some established rule of law, they will be upheld. (*Strauss v. Thoman*, 60 Misc. Rep. 72, 111 N. Y. Supp. 745; *Quentell v. New York Cotton Exchange*, 56 Misc. Rep. 150, 106 N. Y. Supp. 228; *Moffat v. Board of Trade of Kansas City* (Mo. App.), 111 S. W. 894; *Board of Trade of City of Chicago v. Nelson*, 162 Ill. 431, 153 Am. St. Rep. 312, 44 N. E. 743; *Bostedo v. Board of Trade of City of Chicago*, 227 Ill. 90, 81 N. E. 42; *Evans v. Chamber of Commerce*, 86 Minn. 448, 91 N. W. 8; 25 Am. & Eng. Ency. of Law, 1131; 17 Cyc. 852.)

Where the parties themselves have agreed upon the compensation for a breach of contract, or have provided the means by which the amount of damages may be ascertained, this will control and govern. (*Commonwealth Ins. Co. v. Sennett*, 37 Pa. 205; *Bodine v. Glading*, 21 Pa. 50, 59 Am. Dec. 749; *Camp v. Behlow*, 2 Cal. App. 699, 84 Pac. 251; 8 Am. & Eng. Ency. of Law, 636; 13 Cyc. 155, 156; *City of Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263.) So in this case, the parties fixed the measure

of damages by their by-laws, which was a portion of the contract entered into between them, and this will be adopted by the court. (13 Cyc. 155, 156, and cases *supra*.)

Mr. C. M. Parr submitted a brief in behalf of Respondent, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover damages for a breach of contract of sale by plaintiffs to defendants of 5,000 shares of the capital stock of the Butte-Montana Mining Company. It is alleged that on November 13, 1908, the plaintiffs, as copartners doing business as brokers, sold to the defendants, also brokers, upon the floor of the Butte Exchange and under its rules, 4,300 shares at fifty-five cents, and 700 shares at fifty-four cents; that according to the terms of the contract the defendants had the option to demand, pay for, and receive the stock at any time within ten days from the date of sale, Sundays and holidays excluded, but were bound to receive and pay for it within that time; that at the time the sale was made the plaintiffs informed the defendants that the stock was in Pittsburgh, Pennsylvania, and could not be delivered until the expiration of four or five days thereafter, and that defendants consented to accept delivery after the expiration of that time; that afterward the stock did arrive, and thereupon the plaintiffs offered to deposit it as an escrow in bank or in the hands of a third party, as provided by the rules of the Exchange, but that defendants stated that this would not be necessary; that by declining to have the deposit made, the defendants waived the requirement of the rules in this regard; that defendants failed to demand or receive or pay for the stock within the period of ten days, although plaintiffs were ready and willing to deliver the same under the terms of the contract; and that on September 25, 1908, at the expiration of the time within which delivery might be made, plaintiffs offered to deliver the stock and tendered the same to

defendants, but that the defendants refused to accept or pay for the same; that thereupon plaintiffs offered for sale, and sold, the stock on the floor of the Exchange in due course of business at public auction, for the best price obtainable, to-wit, thirty-five cents per share, and that by reason of defendants' refusal to accept and pay for it at the stipulated price, the plaintiffs suffered damage in the sum of \$993.

The answer denies that the defendant Sarah Nichols was ever associated with W. H. Nichols in business. It alleges that W. H. Nichols was a member of the Exchange; that on November 13, 1908, he bought from plaintiffs on the floor of the Exchange 4,300 shares of the stock of the Butte-Montana Mining Company at fifty-five cents, and 400 shares at fifty-four cents; that he had the option of taking the shares at any time within ten days from the date of purchase, upon payment of the price; that he was entitled, upon demand and payment of twenty per cent of the price, to have plaintiffs deposit the shares together with said payment in a bank in the city of Butte to be agreed upon, as a guaranty for the fulfillment of the contract; that on November 14 and 16 he demanded of the plaintiffs a delivery of the stock according to the terms of the contract, but that they failed to produce and deliver it as required by the rules of the Exchange, or to tender it to him either at that time or thereafter; that in order to fill orders for the shares which he had so purchased from plaintiffs, he was compelled to buy other shares and use them in their stead. It concludes with a denial of all allegations in the complaint not specifically admitted. The reply joins issue upon the affirmative allegations in the answer. It then alleges that the defendants at the time of the sale agreed not to require a deposit of the stock as provided by the rules of the Exchange, and hence waived the requirement of the rules in this regard.

At the trial no evidence was introduced tending to connect the defendant Sarah E. Nichols with the transaction. The action seems to have been abandoned entirely as to her. In any event, the trial resulted in a verdict and judgment for plaintiffs against W. H. Nichols alone, for \$936, the difference be-

tween the purchase price of 4,700 shares which he alleges he purchased, and the amount which these shares brought at sale on the Exchange at thirty-five cents. The appeal is by the plaintiffs from an order granting this defendant a new trial. The grounds of the motion were insufficiency of the evidence to justify the verdict, and errors of law occurring at the trial and excepted to by the defendant.

The order granting the motion does not indicate the particular ground upon which the court based its action. If, therefore, it can be justified upon any of the grounds properly laid in the motion, it is incumbent upon this court to affirm it. (*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.) And though in a given case it may appear that the moving party was not upon any alleged error of law entitled to have his motion granted as a matter of right, the action of the court will be sustained if the evidence presents a substantial conflict, for in such case, unless the order expressly excludes the ground of insufficiency of the evidence, it will be presumed that the court, in the exercise of its discretionary power, granted the motion, because it was of the opinion that the evidence was insufficient to justify the finding of the jury. (*Menard v. Montana Central Ry. Co.*, 22 Mont. 340, 56 Pac. 592; *Butte & Boston Min. Co. v. Société Des Mines de Lexington*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111.) As counsel for plaintiffs contend, the trial court should not grant a new trial, except for reasons appearing to it cogent and convincing, because all questions of fact presented by the evidence are primarily to be solved by the jury (*Sutton v. Lowry*, 39 Mont. 462, 104 Pac. 545); yet it has been uniformly held by this court that when a ground of the motion is insufficiency of the evidence, it is as to this ground addressed to the discretion of the trial court, and its action thereon will not be disturbed, unless it is manifest that this discretion has been abused. (*Mattock v. Goughnour*, 13 Mont. 300, 34 Pac. 36; *Haggin v. Saile*, 14 Mont. 79, 35 Pac. 514; *Murray v. Heinze*, 17 Mont. 356, 42 Pac. 1057; *Ray v. Cowan*, 18 Mont. 259, 44 Pac. 821.)

The contract is what is termed a "buyer-ten" contract. By the rules of the Exchange, the seller under such a contract has the privilege of requiring the buyer to deposit the entire purchase price as security for the fulfillment of his engagement, and the buyer may require delivery at any time upon tender of the price or a deposit of the certificates in the hands of a bank or some other third person, for delivery to the buyer upon payment. If either party fails to meet either of these requirements after notice, the transaction may be closed, by purchase or sale, through the secretary of the Exchange on account of the delinquent, and the latter is responsible for any loss. The controversy in the evidence was upon the question whether at the time of the sale it was understood by the parties that the plaintiffs should have four or five days' time to obtain the certificates of stock from Pittsburgh, Pennsylvania, before they could be required to make delivery or deposit, and there was a waiver by the defendants of their right to demand a compliance with the rules until the expiration of this time, or whether the transaction was strictly a "buyer-ten" contract under the rules. The statements of the witnesses, except as to the fact that a sale was made, were in irreconcilable conflict; so much so that upon the printed record before us, it would be difficult to arrive at any just conclusion as to where the right of the controversy is. Such being the condition, it was entirely within the discretion of the court to say that the issue should be tried again, and, under the rule declared in the cases cited, we may not interfere.

It appears that, on November 25, the plaintiffs, having in the meantime received the stock, after failure of defendant to demand and pay for it, sold it at auction upon the floor of the Exchange, at thirty-five cents. As to the measure of damages, the court instructed the jury as follows: "You are instructed that if you find for the plaintiffs in estimating damages, the value of the property to the seller thereof is deemed to be the price which he could have obtained for it in the market nearest to the place at which it should have been accepted by the buyer and at such time after the breach of the contract as would have

sufficed, with reasonable diligence, for the seller to effect a resale. The damage is the difference between the price above mentioned and the contract price.”

The contention is made by counsel that the defendant Nichols was entitled to a new trial as a matter of right, on the ground that this instruction is erroneous in declaring the measure of damages. It is argued that the correct measure is the difference between the purchase price fixed in the contract and the net price which the plaintiffs should have received at a sale of the stock as a pledge to enforce their lien, as provided in sections 5803, 6059 and 6828 of the Revised Codes. The contract was executory, and the title did not pass. (Revised Codes, sec. 4633.) Under section 6059, *supra*, upon a refusal of the buyer to accept the property sold, the seller may exercise one of two options: He may sell the property as a pledge at auction, as is provided in sections 5803 and 6828. In that case the measure of damages is, as provided in subdivision 1 of section 6059, the difference between the contract price and the net proceeds of the sale. He is not bound to pursue this course, however. He may sell the property as his own, in the market at the best available price. In such case the measure of damages is the difference between the price fixed in the contract and its value to the seller, together with the excess of the amount of expense incurred in getting the property to market over and above what such expense would have been, had the buyer accepted it. The value to the seller is to be determined as provided in section 6081, which declares: “In estimating damages the value of property to the seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.” Provisions of the Civil Code of California, identical with the foregoing provisions of our Code, *supra*, were construed and applied in *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406, and *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853. It was held

that the provision contained in section 6081 (California Civil Code, sec. 3353) prescribes the measure of damages applicable to cases like the one before us. We think this the correct construction and adopt it. The evidence is silent as to whether any expense was incurred in effecting the resale. Except as to this element of the measure, the instruction embodies substantially the provisions of section 6081, *supra*, and is correct.

The other contentions made by counsel we do not deem of sufficient importance to merit special notice.

The order is affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. TROSPER, APPELLANT.

(No. 2,858.)

(Submitted June 23, 1910. Decided June 30, 1910.)

[109 Pac. 858.]

Criminal Law—Grand Larceny—Livestock—Possession of Stolen Property — Instructions — Reasonable Doubt — Identity of Property—Evidence—Sufficiency.

Criminal Law—Instructions—Abstract Propositions of Law.

1. District courts, in charging juries, should not submit to them abstract propositions of law without an effort to make such propositions directly applicable to the facts of the particular case before them for trial.

Same—Larceny—Possession of Stolen Property—Correct Instruction.

2. An instruction that evidence of recent possession of stolen property is not in itself sufficient to justify conviction of the crime of larceny correctly stated the law.

Same—Jurors—Judges of What.

3. Jurors are the judges of the credibility of witnesses and of the weight to be given to their testimony; the effect to be given to evidence found to be true must be determined as a question of law.

Same—Grand Larceny—Possession of Stolen Property—Explanatory Evidence—Effect—Erroneous Instruction.

4. In a prosecution for grand larceny the court instructed the jury that "if the defendant offers evidence in explanation of his recent

possession of the property in question, it is for the jury to say under all the evidence whether or not such explanatory evidence is reasonable, satisfactory, probable, or true, and whether or not it be sufficient to raise a reasonable doubt of the defendant's guilt." *Held*, that the instruction was erroneous in that (a) under it the jury were authorized, after finding the explanation to be true, to proceed to determine whether such true explanation raised a reasonable doubt of his guilt, whereas, if found true, the only course open to the jury was to return a verdict of not guilty; and (b) if the explanation raised a reasonable doubt in their minds, it was immaterial whether it was reasonable, probable, satisfactory or true; in that event he was also entitled to an acquittal.

Same—Grand Larceny—Livestock—Identity—Evidence—Sufficiency.

5. On the question of the identity of a heifer charged to have been stolen by defendant, evidence which showed that the animal was branded with the prosecuting witness' brand; that it was of the same breed and general description as the latter's cattle; that the alleged owner had not sold any livestock of the character of the one in question for ten years prior to the taking; that the animal was afterward found near the range where his cattle pastured, and that there was not anyone else in that section of the country who used the same or a similar brand—*held* sufficient to go to the jury.

Appeal from District Court, Sanders County; Henry L. Myers, Judge.

THOMAS TROSPER was convicted of grand larceny, and appeals from the judgment and from an order denying him a new trial. Reversed and remanded.

Mr. Harry H. Parsons, and *Mr. H. J. Burleigh*, submitted a brief, and argued the cause orally in behalf of Appellant.

The testimony fails to show any *animus furandi*, any guilty intent, any identification even of the animal alleged to be the property of the prosecuting witness. (*Watson v. State* (Tex. Cr. App.), 82 S. W. 514.) This court has held that the mere fact that the brand belonged to the prosecuting witness, and that the animal bore such brand, was not proof that they belonged to the prosecuting witness at the time they were taken away or the defendant was not rightly in possession of the animal. (*State v. De Wolf*, 29 Mont. 415, 74 Pac. 1084; see, also, *Brooks v. People*, 23 Colo. 375, 48 Pac. 502; *Turner v. State*, 39 Tex. Cr. 322, 45 S. W. 1020; *Steed v. State*, 43 Tex. Cr. 567, 67 S. W. 328; *Sapp v. State* (Tex. Cr.), 77 S. W. 456.)

Instruction No. 10 compels the defendant to be judged by a double standard in the alternative. Either he must explain his possession *fully*, or so far as to raise a reasonable doubt. The word "fully" casts upon defendant a greater burden than is permitted by law. Evidence may be sufficient to raise a reasonable doubt and justify an acquittal, although it is insufficient to explain such possession *fully*. (*Wheeler v. State*, 79 Neb. 491, 113 N. W. 253.)

Instruction No. 14 requires the defendant, after he has established his rightful possession by evidence sufficient to raise a reasonable doubt in the minds of the jury, to go further and convince the jury that such explanatory evidence is reasonable, satisfactory, probable or true. As a matter of fact, his explanation may be sufficient to raise a reasonable doubt and not be true. It may be sufficient to raise a reasonable doubt, and not be satisfactory or probable or reasonable, and we submit that, under these instructions or either of them, the court committed error. (*State v. Judd*, 20 Mont. 420, 51 Pac. 1033.) Instruction No. 14, alone and with instruction No. 10, further is inherent with the vice of invading the province of the jury and of casting upon the defendant a burden of proof not required by law, and virtually lays down a dual standard by which to test the guilt or innocence of the defendant, as above stated. (*People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843; *Sutherlin v. State*, 148 Ind. 695, 48 N. E. 246; *Gilford v. State*, 48 Tex. Cr. 312, 87 S. W. 698; *Hart v. State*, 47 Tex. Cr. 156, 82 S. W. 652; *McCulloh v. State* (Tex. Cr.), 71 S. W. 278; *Denton v. State*, 46 Tex. Cr. 193, 79 S. W. 560; *Hopperwood v. State*, 39 Tex. Cr. 15, 44 S. W. 841; *Jordan v. State*, 51 Tex. Cr. 646, 104 S. W. 900.)

In behalf of the State there was a brief by *Mr. Albert J. Galen*, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General. *Mr. Hall* argued the cause orally.

A brand known, or admitted to belong, to an individual, whether recorded or not, is considered evidence of ownership.

In *People v. Bolanger*, 71 Cal. 17, 11 Pac. 799, the court said: "An unrecorded brand is some evidence of ownership." In *State v. Wolfley*, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337, 11 L. R. A., n. s., 87, 12 Ann. Cas. 412, the court ably discusses the question of brands as evidence of ownership, refers to many cases, and says: "We regard it as clear that, where an animal is found bearing a certain brand, a just inference may be drawn that it belongs to the person who uses such brand, and that, therefore, in the absence of any statute on the subject, the jury may treat the brand as evidence of ownership." To the same effect, see, also, *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; *Hurst v. Territory*, 16 Okl. 600, 86 Pac. 280; *Queen v. Forsythe*, 4 Ter. L. Rep. 398. The Texas cases cited by appellant as to brands, not being evidence of ownership, are not in point, for the reason that the Texas statute expressly declares that, "No brand, except such as are recorded * * * shall be recognized in law as any evidence of ownership."

We submit that neither instructions No. 10 nor 14 is prejudicial to defendant, as they each tell the jury that if a reasonable doubt is raised, the defendant should not be convicted. These instructions, when considered with others given, clearly tell the jury that the state must prove every material matter, beyond a reasonable doubt, and that defendant need only raise a reasonable doubt to be acquitted. (*State v. Wolfley*, 75 Kan. 406, 89 Pac. 1046, 93 Pac. 337, 11 L. R. A., n. s., 87, 12 Ann. Cas. 412; *State v. Powers*, 39 Mont. 259, 102 Pac. 583.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Thomas Trosper was convicted of grand larceny in stealing a certain cow or heifer alleged to be the property of one Axel Schulstad, and has appealed from the judgment and from an order denying him a new trial. It will only be necessary to consider two of the specifications made.

1. Among others, the court gave instruction No. 14, as follows: "You are instructed that the recent possession of the

stolen property, if it be proven by all of the evidence beyond a reasonable doubt to have been stolen, while not alone sufficient evidence to find the possessor thereof guilty of the crime of having stolen such property, when he is charged with the stealing thereof and made a defendant in a criminal action therefor, yet it may be taken into consideration by the jury, together with all the other evidence in the case, in determining the guilt or innocence of the defendant under such charge; and if the defendant under such circumstances offers and produces evidence in explanation of his possession of such property, it is for you to say under all the evidence whether or not such explanatory evidence is reasonable, satisfactory, probable or true, and whether or not it be sufficient to raise a reasonable doubt of the defendant's guilt under the charge."

In addition to being erroneous, this instruction fairly illustrates the vice, which is all too prevalent, of attempting to give to a jury an abstract proposition of law, without any attempt to make it directly applicable to the facts of the particular case. This court has heretofore had occasion to condemn this practice (*First National Bank of Portland v. Carroll*, 35 Mont. 302, 88 Pac. 1012); a jury of laymen ought not to be charged with making the application themselves. If the rule stated is not applicable, it ought not to be given at all; and, if it is applicable, it ought to be made so by the court that the jurors will understand its meaning. But the instruction does not correctly state an abstract rule of law. It might or might not be correct, dependent upon the facts of any case to which it could be applied. We must assume that the trial court intended the jurors to apply the instruction to the facts of this case; and we must assume further that the jurors did so; and, if they did, the error is not only apparent but glaring.

Assuming, for the purpose of argument only, that the evidence produced by the state showed conclusively that the animal in question belonged to Schulstad, and that it was recently stolen from him by some one, and was in the possession of the defendant immediately prior to the time this charge was made,

then the first portion of this instruction correctly tells the jury that such evidence of recent possession is not in itself sufficient to justify conviction. This has been the rule in this jurisdiction for many years. But the court then proceeds to tell the jury that, if the defendant offers an explanation of his recent possession, it is for the jury to say whether such explanation is reasonable, satisfactory, probable or true, and whether it is sufficient to raise a reasonable doubt of defendant's guilt. The explanation offered by the defendant, as shown by this record, was or was not true. If it was true, it constituted an absolute defense, and the court so announced in another instruction. If it was not true, the jury would be at liberty to disregard it altogether, and should have been instructed accordingly. If the jury found the explanation to be true, there was not anything further for them to do but to return a verdict of not guilty. But by this instruction they are told that after finding the explanation to be true, if they did find it to be true, they should then proceed to determine whether such true explanation raised a reasonable doubt of defendant's guilt. This was constituting the jury, not triers of fact, but judges of law. They were left to say what shall be the legal effect of certain evidence after it is found to be true. Jurors are the judges of the credibility of witnesses and of the weight to be given to their testimony; but the effect to be given to evidence found to be true is to be determined as a question of law.

The words "reasonable," "satisfactory," and "probable," used in the instruction, are defined as follows: "Reasonable" means governed by reason; agreeable to reason; synonyms: just, honest. "Satisfactory" means relieving the mind of doubt or uncertainty, and enabling it to rest with confidence. "Probable" means capable of being proved; having more evidence for than against. (Webster's International Dictionary.) So that, as applied to this case, these words all mean substantially the same thing, and must have been so understood by the jury. When one is charged with the commission of a larceny, and the evidence offered by the state shows that the property

was stolen by some one, and that the defendant was recently in possession of it, it is wholly immaterial how strong the case may be; there cannot be a conviction if the evidence offered by the defendant in explanation of his possession is sufficient to raise a reasonable doubt of his guilt. His explanation may or may not in fact be reasonable, probable, satisfactory, or true; yet, if in the minds of the jury it creates a reasonable doubt of his guilt, he is entitled to an acquittal. While there are a few states in which this rule is denied, it is well-nigh universal and has been so recognized in this country for a century or more. The rule is fairly well stated in 25 Cyc. 137, as follows: "Defendant is not bound to prove the truth of his explanation; the presumption arising from recent possession is removed if the explanation leaves the matter in doubt. In other words, when such a reasonable explanation of the possession is given, the prosecution must establish the falsity of it beyond a reasonable doubt." And many authorities are cited in support of the text. As we cannot fathom the minds of the jurors, we cannot say that this instruction did not lead them to require from the defendant a *quantum* of proof greater than that imposed by law. We must assume that they understood the instruction and applied it as given.

We are not prepared to say that instruction No. 10, given by the court, is erroneous, when tested by the strict rules of law; but it is so phrased that it is likely to mislead, instead of enlighten, the jury. In speaking of the defense interposed by the defendant, the court should not have said, "And if the defendant establish this [defense] by the evidence fully," even though the expression is immediately followed by a correct statement of the rule of law.

2. It is urged that the evidence of ownership or identity of the animal, as the property of Schulstad, is insufficient to go to the jury, and *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084, is relied upon. In the *De Wolfe Case* we did not go further than to say: "The fact that the O L brand belonged to Houk, and that the horses bore such brand, was not proof that they be-

longed to Houk at the time they were driven away, or that defendant was not rightfully in possession of them." The present case is very different, and while it will not be necessary for us at this time to go to the extent that the Canadian court went in *Queen v. Forsythe*, 4 Ter. L. Rep. 398, we do think the evidence in this case upon this question was sufficient to go to the jury. The evidence tends to show that the animal in question was branded with Schulstad's brand; that it was of the same breed and general description as Schulstad's cattle; that Schulstad had not sold any cattle of this character within the last ten years; that this animal was found near the range where Schulstad's cattle pastured; and that there was not anyone else in that section of the country who used that or a similar brand. But since a new trial must be ordered, we will not consider the evidence further.

For the error in giving instruction No. 14 above, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

MURRAY, APPELLANT, v. BUTTE-MONITOR TUNNEL MINING CO. ET AL., RESPONDENTS.

(No. 2,846.)

(Submitted June 25, 1910. Decided July 2, 1910.)

[110 Pac. 497.]

Personal Property—Transfer—When Considered Pledge—Inadequacy of Price—Option to Repurchase—Burden of Proof—Equity Cases—Findings—Review.

Equity—Findings—Review.

1. Under section 6253, Revised Codes, the findings of the trial court in an equity case will not be disturbed on appeal unless there is a decided preponderance of the evidence against them.

Corporate Stock—Transfer—Pledge—Evidence.

2. Evidence held to show, as found by the district court, that a transfer of corporate stock was intended to secure a loan and not as an absolute sale.

Same—Transfer—When Considered Pledge to Secure Loan.

3. Where a transfer of personal property had, in its inception, for its purpose a loan and not a sale, the transaction will be held to have been a pledge, unless it is made to appear that the parties later contracted for an absolute sale.

Same.

4. In determining whether one, who, while in financial straits, transferred personal property to obtain means to relieve his situation (which was known to the transferee), intended the transaction as a pledge or a sale, a court of equity will take into consideration his necessitous condition, and be inclined to hold that a pledge was in contemplation, rather than an absolute sale.

Same—Transfer—Pledge—Inadequacy of Price.

5. In determining the nature of a transaction alleged to have been an absolute sale of corporate stock, gross inadequacy of price (\$20,000, whereas its value was testified to as from \$75,000 to \$150,000) was a circumstance lending support to the finding of the court that a pledge was intended.

Same—Transfer—Pledge—Burden of Proof.

6. Where a transfer of property is absolute on its face, the party asserting that it was intended as security only assumes the burden of showing such fact by clear and satisfactory proof; where, however, there is a contemporaneous agreement to reconvey, the burden is upon him who contends that the instrument was an absolute sale.

Same—Transfer—Option to Repurchase—Nature of Transaction.

7. In case of doubt whether a transfer of property, accompanied by an option to repurchase, was intended as a sale or as security for a loan, courts are inclined to hold in favor of the latter theory.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

SUIT by James A. Murray against the Butte-Monitor Tunnel Mining Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

In behalf of Appellant, there was a brief by *Mr. R. L. Clinton*.

Messrs. Walsh & Nolan submitted a brief in behalf of Respondents. *Mr. T. J. Walsh* argued the cause orally.

Where, in a case of this character, inadequacy of consideration and mental weakness are found, the court will presume

either imposition or undue influence, and unless the *bona fides* of the transaction are fully shown, the alleged sale will be set aside. (*Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Ashmead v. Reynolds*, 134 Ind. 139, 39 Am. St. Rep. 238, 33 N. E. 763; *Clark v. Lopez*, 75 Miss. 932, 23 South. 648, 957; *Harding v. Wheaton*, 2 Mason, 378, Fed. Cas. No. 6051; *Allen v. Allen*, 79 Vt. 173, 64 Atl. 1110.) The rule announced in these cases is indorsed in 1 Perry on Trusts, 187-189, and in 29 Am. & Eng. Ency. of Law, 112. And even though there should be nothing expressly shown by the evidence, the authorities hold that undue influence or imposition will be inferred from mental weakness and great inadequacy. (*Turner v. U. T. I. Co.*, 10 Utah, 61, 37 Pac. 91; *Fishburne v. Furguson*, 84 Va. 87, 4 S. E. 575; *Hale v. Kobbert*, 109 Iowa, 128, 80 N. W. 308; 2 White & Tudor's Leading Cases in Equity, 1242.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prior to the time of the transaction out of which this suit arose, William S. Switzer was indebted to G. W. and Guy Stapleton in the sum of \$10,380, and, to secure such indebtedness, had delivered to the Stapletons in pledge certificates representing 1,500,000 shares of the capital stock of the Butte-Monitor Tunnel Company. The indebtedness having become due, the Stapletons brought an action to enforce payment and to foreclose their lien upon the stock. The action had gone to judgment, in favor of the Stapletons, for \$17,969.27, including interest and costs, and the sheriff was about to sell the pledged stock, when Switzer secured from James A. Murray the money to discharge the Stapleton judgment, and at the same time secured an amount in addition thereto sufficient to make the total amount received by him from Murray \$20,000. At the same time Switzer delivered to Murray certificates representing 2,146,650 shares of the capital stock of the Butte-Monitor Tunnel Company, indorsed in blank. The transaction between Switzer and Murray occurred September 1, 1908. In March,

1909, Murray made demand upon Switzer, the president of the tunnel company, and upon Maloney, its secretary, that they cause a transfer of the 2,146,650 shares to be made upon the books of the corporation. This demand was refused, and the present suit was brought against the tunnel company, Switzer and Maloney to compel such transfer.

Stated briefly, the complaint alleges that on or about September 1, 1908, Switzer sold, assigned, transferred and delivered to plaintiff the 2,146,650 shares mentioned above, for a valuable consideration, and ever since said date plaintiff has been the owner of said shares; that at the time of said sale plaintiff received from Switzer certificates representing the shares of stock and each of said certificates was duly indorsed by Switzer; that on March 15, 1909, plaintiff made demand on the president and secretary of the company that they make transfer upon the books of the corporation, that they receive the certificates so indorsed to him, cancel the same, and issue to him new certificates representing a like amount of the capital stock of the company, but that this demand was refused.

To this complaint the defendants made joint answer, but, as conceded by both parties to this appeal, the allegations of the answer are not material here, except in so far as they disclose the defense and equitable counterclaim of the defendant Switzer. Switzer alleges that at the time of the transaction with Murray, the 2,146,650 shares of stock were and ever since have been worth \$150,000. The facts are then alleged to show that the transaction between Murray and Switzer, described in the complaint, amounted only to a loan of \$20,000, by Murray to Switzer, and the pledging of the certificates representing the stock by Switzer to Murray to secure the loan. It is then alleged that at the time of the transaction, Switzer was a man of advanced age, was suffering from senile dementia, and was not mentally able to transact business of great importance, and that Murray is seeking to take advantage of him and to claim that the transaction was in fact a sale. A readiness and willingness to repay the \$20,000 with interest is pleaded, and the answer concludes

with a prayer that Switzer be permitted to redeem the certificates upon paying to Murray the principal sum with interest. The reply puts in issue these affirmative allegations of the answer, reasserts that the transaction was a sale, and alleges that, at the time of its consummation, Murray executed and delivered to Switzer an option in writing to repurchase the stock on or before January 1, 1909, upon payment of \$30,000.

Upon the issues thus made, the cause was brought on for trial before the court sitting without a jury. The trial court found that the transaction between Murray and Switzer amounted to a loan by Murray to Switzer of \$20,000, and that the shares of stock were pledged by Switzer to Murray to secure the loan. A decree was rendered and entered which adjudges that there is due to Murray from Switzer \$20,000, with legal interest thereon from September 1, 1908; that Switzer is the owner of the pledged stock; that, if Switzer shall within thirty days pay over to Murray the amount adjudged to be due, then Murray shall surrender up the certificates representing the stock, but if Switzer shall fail to make payment within the time limited, then Murray is directed to sell the stock at public auction, and apply the proceeds of the sale to the satisfaction of his claim and pay the overplus, if any, to Switzer. From the judgment and an order denying plaintiff a new trial, he has appealed.

In appellant's brief it is said: "The only question for the court to determine is whether or not the transaction was a sale or a pledge of the stock." We do not agree with counsel as to the form of the question. The question thus stated correctly represents the controversy as it was presented to the trial court; but this is a court of review, and we have heretofore had occasion to define our relationship to the trial court under the provisions of section 6253, Revised Codes. Under the construction of that statute as heretofore given, we adopt the findings of the trial court, unless it appears that the evidence fairly preponderates against such findings. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860; *Copper M. M.*

& S. Co. v. Butte & Corbin M. Co., 39 Mont. 487, 133 Am. St. Rep. 595, 104 Pac. 540.) In the last case this court said: "In equity cases, such as this, though this court may examine the evidence and determine the question of fact for itself (Revised Codes, sec. 6253), yet it may not overturn the findings of the trial court unless there is a decided preponderance of the evidence against them." In view of the rule thus repeatedly announced by this court, the question which this appeal presents for our determination should be stated as follows: Does the evidence which this record contains preponderate against the finding made by the trial court, that the transaction between Switzer and Murray amounted only to a pledge of the stock as collateral security for the loan of \$20,000?

On behalf of the plaintiff there is in the record the testimony of Murray and his agent Chapman that when application was made by Switzer for a loan, Murray declined to loan the money upon the security offered, but did offer to purchase Switzer's stock for \$20,000, and to give Switzer an option to repurchase it at any time before January 1, 1909, upon payment of \$30,000, and that this offer was accepted by Switzer, and that the offer and acceptance constituted the only contract between the parties. To this there is to be added the circumstance that there was not any evidence of indebtedness given by Switzer to Murray. In *Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240, this court said: "We are not to be understood as saying that there must be some promise in writing to pay the debt, where the mortgage is given to secure the payment of money; that promise may be implied from the facts. Still the absence of any writing showing an express promise to pay is said to be strong evidence that the transaction was not one of security." There is also in the record the evidence of two witnesses called by the plaintiff, who testified that at the time of the transaction the entire property of the Butte-Monitor Tunnel Company—the mining claims and improvements—was not worth more than \$10,000. Upon that basis, Switzer's interest was worth approximately \$5,800.

As opposed to plaintiff's contention, there is the evidence of M. V. Conroy, who testified that Switzer came to him, explained his financial difficulties arising from the fact that his stock was about to be sold in satisfaction of the Stapleton judgment, and solicited Conroy's aid in procuring a loan sufficient to meet Stapleton's demand and prevent the sale; that Switzer told him that he was willing to pay a good rate of interest. Conroy then testified that he went to Murray's bank, and, Murray being absent, he presented the matter to Chapman, who told him that he would submit it to Murray; that soon after this Chapman telephoned to him that Murray was back in Butte; that he then started for Murray's bank but met Murray on the street, who directed him to send Switzer to him (Murray), and that he (Murray) would discuss the matter with Switzer; that he is informed that Switzer went to see Murray; that on the day before the sale was to occur he (Conroy) again met Murray, and talked the matter over with him, with the result that Murray said: "I don't want to see the Stapletons skin the old man [meaning Switzer], not that I have got any sympathy with the old man, but I don't want to see the Stapletons skin him, and, for that reason, I will make him the loan"; that on September 1 the transaction was closed at Murray's bank, Murray, Chapman, Switzer and Conroy being present; that Murray then paid over \$17,969.30, the amount necessary to satisfy the Stapleton judgment, and this amount was taken by Conroy and Chapman to the sheriff and paid over to that officer, who in turn delivered to them the 1,500,000 shares of stock which had been advertised for sale; that this stock was taken back to Murray's bank; that when he and Chapman returned with the stock from the sheriff's office they found Switzer in the bank, indorsing the certificates representing the other 646,650 shares; that all of the stock was then turned over to Murray; that Murray then made out a check to Switzer for \$2,030.70, the balance of the \$20,000; that while Switzer was engaged in indorsing the certificates and after all the money had been paid over, Murray handed to him (Conroy) a paper, and said: "You keep this, the old man

doesn't know anything." The paper was introduced in evidence, and is the option to Switzer to repurchase the stock referred to above. Concerning this paper Conroy testified further: "I kept it. I have had it ever since. Mr. Switzer never saw it. I didn't want to show him. It wasn't our agreement, the agreement we had. I was afraid he would 'go up in the air.'" He also testified that prior to the time Murray handed him the paper there had not been any mention made of an option. Conroy further testified: "I only met Mr. Murray after the transactions, and, I think, the second or third day after the transaction occurred, and he told me that he found out that the property was more valuable than he thought it was, and he says, 'I can make a deal.' He says: 'I am going to New York, and I can make a deal on that property for the old man, and get him a good, handsome sum of money.' He says: 'I don't see what the old man wants more money for; he couldn't spend ten thousand dollars in the natural course of his life.' I says: 'That is not the condition. If the property is valuable, the old man is entitled to get what it is worth.' " He also testified that he received a commission of \$1,000 for procuring the loan from Switzer, and that he gave \$500 to Chapman. Chapman admits the receipt of the \$500, but denies that it was commission for assisting in procuring a loan. There is some evidence in the record which may be said to reflect upon the credibility of some of the witnesses, particularly upon Conroy. But it will not be necessary to consider it at length.

We cannot imagine that the trial court attached much importance to Switzer's testimony, for his mental infirmity is painfully apparent; in fact, a guardian was appointed for him after the trial and before the appeal was perfected; but from all his evidence there is to be gathered the positive assertion that he never intended to sell his stock to Murray, but understood that he was securing a loan and pledging his stock as security. But the trial court was not left to determine the issue upon the uncorroborated evidence of Conroy and Switzer. There are a number of facts and circumstances which tend strongly to confirm their view of the transaction. These are:

(a) The transaction in its inception had for its purpose a loan, not a sale. All the witnesses agree that the original application to Murray was for a loan, to be secured by a pledge of Switzer's stock.

In 3 Devlin on Deeds, section 1117, the author says: "Where a person who appears to be a grantor desired in the inception of the transaction to borrow money, and obtains the money, courts are inclined to say that the parties have made a mortgage, although the transaction may have assumed the form of a sale."

In *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323, the court quotes with approval the following from 3 Devlin on Deeds, section 1118: "As the intention of the grantor in the beginning was to borrow money, the presumption is natural, unless an alteration of this intention is shown, that any transfer of his property connected with negotiations for borrowing money was made as security for a loan. And this is true though a different consideration than the one first sought be recited in the deed. The parties having treated as borrower and lender, the conveyance will be considered a mortgage, unless it appears that they afterward contracted for a sale of the property, without reference to the loan"; and then proceeds: "So we take the rule to be that the burden of proof is upon the party who alleges that an absolute deed is a mortgage, and that the proof must be clear and convincing. (*Worley v. Dryden*, 57 Mo. 226.) Yet, when the transaction had its inception in an application for a loan, the courts are inclined to scrutinize it closely, and to hold it a mortgage, unless it clearly appears the parties changed their minds afterward."

In 1 Jones on Mortgages, section 266 (fifth edition), it is said: "When an absolute conveyance has been made upon an application for a loan, and an agreement is made to reconvey upon payment of the money advanced, as a general rule the transaction is adjudged to constitute a mortgage. In such case the purpose of the grantor was in the beginning to borrow money; and unless a change be shown in his intentions it is presumed that any use he may have made of his real estate, in connection with it, was merely as a pledge to secure a loan. The parties having origi-

nally met upon the footing of borrowing and lending, although a different consideration be recited in the deed, it will be considered a mortgage until it be shown that the parties afterward bargained for the property independently of the loan." (See, also, 8 Ency. of Evidence, 710; *Eiland v. Radford*, 7 Ala. 724, 42 Am. Dec. 610.)

(b) Switzer was in financial distress at the time of the transaction. Upon this feature of the case there cannot be any conflict in the evidence. That Murray knew of Switzer's impending peril, occasioned by the advertised sale of his stock to satisfy the Stapleton judgment, Murray himself admits. Upon this subject the rule is stated in 27 Cyc. 972, as follows: "If the grantor was severely pressed for money at the time of the transfer, so as not to be able to exercise a perfectly free choice as to the disposition of his property, and raised the sum needed by conveying the property in fee with a right of repurchase, his necessitous condition, especially in connection with the inadequacy of the price, will go far to show that a mortgage was intended." And again, at page 1014: "If the grantor in a deed absolute in form, but alleged to have been intended as a security, was financially embarrassed at the time of its execution, being sorely pressed for money, and therefore at the mercy of his creditor and unable freely to dictate the terms of the security, this circumstance will be considered, as tending to show the intention to create a mortgage." (*Bright v. Wagle*, 3 Dana (Ky.), 252.)

In *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927, the supreme court of the United States, in speaking on the subject, said: "It is true Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties."

(c) The price which Murray claims he paid for the property appears to have been grossly inadequate. Upon the question of

value, the defendant Switzer called John Gillie, Guy Stapleton, John A. Cannon, James H. Maloney and John W. Eddy, men who appear to have had wide experience with, and intimate knowledge of, mining properties in and about Butte, and by these witnesses the value of Switzer's interest at the time of the transaction is fixed at from \$75,000 to \$150,000.

The rule upon this subject is stated in 1 Jones on Mortgages, section 275, fifth edition, as follows: "Inadequacy of price is one of the circumstances which are considered as of weight, as tending to show that an absolute conveyance accompanied by an agreement to reconvey is a mortgage rather than a conditional sale. This alone will not authorize a court to give the grantor a right to redeem, but in connection with other evidence affords much ground of inference that the transaction was not really what it purports to be. Inadequacy of price, to be of controlling effect, must be gross. If it be very inadequate, it is a circumstance tending to show a loan and mortgage; but it is not conclusive."

In *Russell v. Southard*, above, the supreme court of the United States was considering a case of a conveyance which on its face was apparently intended to evidence a sale. The consideration was something over \$4,800, while the value of the property involved was from \$10,000 to \$12,000. The court said: "The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed. In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold." Then, after referring to the consideration which actually passed and the real value of the property in controversy, the court proceeds: "We cannot avoid the conclusion that this consideration was grossly inadequate;

and therefore we must take along with us in our investigations the fact that there was no real proportion between the alleged price and the value of the property said to have been sold."

In *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410, the court was considering a case in which the consideration for the transfer was not more than \$1,200, while the value of the property was not less than \$4,000. The court announced the general rule as follows: "One of the circumstances tending strongly to show that a deed absolute in form was only a mortgage is the fact when it appears that there was great inequality between the value of the property conveyed and the price alleged to have been paid for it"; and applied it to the facts of the case in the following language: "The consideration for the deed was then altogether inadequate, and it seems quite incredible that plaintiff would be willing to sell out all his property, even to his brother, for about one-fourth of its value."

In *Glass v. Hieronymus*, 125 Ala. 140, 82 Am. St. Rep. 225, 28 South. 71, the court said: "By uncontradicted evidence it is shown that the lands were worth nearly or quite double the amount paid by appellant. In cases of this nature, such a fact is usually considered as having an important bearing in favor of the mortgage theory."

In *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671, the court said: "If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists (Story's Equity, secs. 239, 245, 246); and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so." (*Eiland v. Radford*; *Bright v. Wagle*, above.)

In Jones on Pledges, section 20, it is said: "In determining whether a transaction in the form of a sale is a pledge or a sale, either absolute or conditional, inadequacy of price is a circumstance which indicates that it was only a pledge." (*McKinney v. Miller*, 19 Mich. 142.)

(d) According to Murray's own theory, the transaction did not amount to an absolute sale, but to a conditional sale; that is, a sale with an option to Switzer to repurchase. In many of the states it is held that where there is a deed absolute on its face, accompanied by a contract to reconvey, the transaction in law constitutes a mortgage; but in *Gassert v. Bogk*, above, this court declined to go to that extent, but did announce the doctrine which will hereafter be referred to. Most of the courts which do not hold that a deed absolute and a contract to reconvey constitute a mortgage, do hold that they are strongly indicative that a mortgage was intended. (20 Ency. of Law, 2d ed., 947; *Marshall v. Stewart*, 17 Ohio, 356.)

As reflecting upon the probability of Murray's version of the transaction, the trial court had before it these facts: (1) Switzer had an exaggerated idea of the value of the property, and had refused to sell it at prices ranging from \$100,000 to \$500,000, and the options which he had given on his stock were for very large amounts—from ten to twenty times the amount which passed between him and Murray. (2) Murray said that he would not consider the proposition to loan money on Switzer's stock as security—that he would as soon loan money on a shoal of fish in the Pacific Ocean—and yet this property, which was apparently deemed by him worthless as security for a loan of \$20,000, was considered by him sufficiently valuable to induce him to pay \$20,000 in cash for it. (3) Murray offered evidence to show that Switzer's stock was worth not more than \$5,800, and yet he apparently prefers stock of that value to the return of his \$20,000 and interest, and in this suit is resisting the offer of Switzer to make full restitution of the amount advanced by him, with interest thereon at eight per cent per annum. (4) Murray claims that he purchased Switzer's stock outright

and brings this suit to compel the transfer of the stock on the company's books, and yet he does not offer any explanation for his failure to have the transfer made at the time of the transaction.

The trial court was called upon to determine and apply the correct rule as to the burden of proof, and the finding made indicates that the court was correct in its determination. The authorities may fairly be said to be unanimous upon this subject. If the conveyance on its face is absolute, then the party asserting that it was intended as security only assumes the burden of showing such fact by clear and satisfactory proof. "The rule is different, however, in the case of a conditional sale of real estate, or where there is a contemporaneous agreement to reconvey. Here the courts incline to the theory of mortgage, and if a doubt arise whether a sale or a mortgage was intended, the doubt will be resolved in favor of mortgage." (8 Ency. of Evidence, 718.) To the same effect is 27 Cyc. 972, and 1 Jones on Mortgages, section 279.

In *Peagler v. Stabler*, 91 Ala. 308, 9 South. 157, it is said: "Courts of equity are not favorable to conditional sales, and if it be doubtful whether the transaction was a conditional sale or a mortgage, the courts incline to hold that the agreement was intended to be a mortgage."

But the rule is established in this state. In *Gassert v. Bogk*, above, this court said: "(5) Where there is a deed and a contract to reconvey, and oral evidence has been introduced tending to show that the transaction was one of security, and leaving upon the mind well-founded doubt as to the nature of the transaction, then courts of equity incline to construe the transaction as a mortgage."

While most of the cases cited above deal with deeds and mortgages of real estate, it is needless to say that the same rules apply to sales and pledges of personal property. Any facts and circumstances admissible to show that a conditional sale of real estate was intended as a mortgage are equally admissible to show that a conditional sale of personal property was in fact a pledge.

(*Eiland v. Radford*, above; 31 Cyc. 797, 790, and note.) And the rule as to the burden of proof is the same. "In case of doubt whether a transaction by which personal property is given as security is a pledge, or a sale, mortgage, or absolute assignment, the law favors the conclusion that it is a pledge." (31 Cyc. 797; Boone on Mortgages, sec. 288.)

In addition to all the evidentiary facts and circumstances referred to above as tending to support the trial court's finding, the learned judge who presided in the district court occupied the advantageous position, over the members of this court, in being able to hear the witnesses while upon the stand and to observe their demeanor. He was therefore able to judge of their credibility from their appearance, their apparent frankness or lack of it, and their apparent fairness or lack of fairness. If this court can overturn the finding of the lower court in this case, we can scarcely imagine a case in which we would not be justified in doing the same thing. We think appellant has failed to maintain the burden, which he assumed, of showing that the evidence preponderates against the trial court's finding.

But much reliance is placed by appellant upon the case of *Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507, which was a suit to have a deed declared to be a mortgage. The deed was a bargain and sale deed, absolute on its face, by which Mrs. Morrison conveyed to Jones all her right, title and interest in and to certain property. Contemporaneously with the execution and delivery of the deed, a contract in writing was executed and signed by Mrs. Morrison and Jones, which recites that Jones is the owner of the interest in the property; that Mrs. Morrison is desirous of purchasing such interest from Jones, and then proceeds to state the terms and conditions upon which such purchase might be made. When the cause came before this court on appeal, it was said: "The written terms of the deed and the concurrent agreement appear to cover about every phase of the claim, and negative any claim of indebtedness." From this it is apparent that this court considered the parties bound by the

terms of the contract, and did not consider any evidence *dehors* the record as thus made. The case is easily distinguishable from the one now before us, and the decision does not conflict in the least with the conclusion we have reached here.

We do not find any error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing granted September 12, 1910.

ON REHEARING.

(Submitted September 26, 1910. Decided October 15, 1910.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 2 of this year the decision was made by this court in the above-entitled cause and the opinion filed. Upon the former hearing and submission of the cause, counsel for appellant was absent and therefore unable to present the matter by way of oral argument. Thereafter he presented a motion for a rehearing, and, because of his inability to orally argue the cause upon the first presentation, and because of his earnest insistence that this court did not give proper consideration to the decision in *Morrison v. Jones*, 31 Mont. 154, 77 Pac. 507, as it affects the decision of this case, a rehearing was granted and the cause argued by counsel for the respective parties and submitted. Upon consideration of the matter on this rehearing, we have examined at length the record in *Morrison v. Jones*. With one exception, the facts of that case are set forth fully and correctly in the opinion as it appears in 31 Montana, above. The one fact which might have been added and which would only have fortified the decision is, that Mrs. Morrison received from Jones the contract to convey, dated May 2, 1900, and knew the contents thereof and of the deed of even date therewith,

before she executed the deed or received the contract. This fact appears from the record repeatedly and fully justified this court in saying: "The written terms of the deed and the concurrent agreement appear to cover about every phase of the case." The court might properly have omitted the word "about." With these facts all before us again, we are more firmly convinced than ever before that there is not anything in the decision of *Morrison v. Jones* to conflict in the slightest degree with our former decision in this case.

What is said in the written opinion heretofore filed on July 2, 1910, is adopted in full as the expression of our opinion now; and the judgment of the district court of Silver Bow county rendered and entered on the sixteenth day of October, 1909, and the order of that court made on the third day of January, 1910, overruling plaintiff's motion for a new trial are affirmed. *Remittitur* forthwith.

MR. JUSTICE SMITH concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

BEELEER ET AL., RESPONDENTS, v. BUTTE & LONDON COPPER DEVELOPMENT CO., APPELLANT.

(No. 2,840.)

(Submitted May 25, 1910. Decided July 6, 1910.)

[110 Pac. 528.]

Mines and Mining — Personal Injuries — Survival of Action — Statute of Limitations — Jury — Examination on Voir Dire — Negligence — Pleading and Proof — Damages Recoverable — Evidence — Admissibility.

Mines and Mining—Personal Injuries—Survival of Action—To Whom.

1. Under the express provision of section 5250, Revised Codes, the right of action to recover damages for injuries to a mine employee, alleged to have been caused by the negligence of a fellow-servant,

survives to, and may be prosecuted and maintained by, the heirs or personal representatives of the deceased.

Same—Statute of Limitations—“Liability Created by Statute.”

2. *Held*, that an action brought under Chapter 23, Laws of 1905, p. 51 (Revised Codes, secs. 5248–5250), to recover damages for injuries to a mine employee, does not fall within the category of those founded “upon a liability created by statute,” mentioned in section 6449, subdivision 1, as being barred unless brought within two years.

Same—Jurors—Examination on *Voir Dire*—Scope.

3. Defendant mining company, the employees of which were insured against accident by a casualty company, cannot be said to have been prejudiced by the action of the district court in permitting plaintiff to ask each juror on his *voir dire* whether he had any business relations with such casualty company, where it was not apparent that either the purpose or tendency of the question was to inform the juror that the burden of any judgment against the mining company would not fall upon it, but upon the casualty company, and where the latter company was not thereafter mentioned in the case.

Same—Negligence—Fellow-servants—Evidence—Sufficiency.

4. Evidence, circumstantial in character, *held* sufficient to warrant submission of the case to the jury on the question whether injuries to a mine employee were caused through the mishandling of a hoisting engine by the engineer, his fellow-servant, so as to make defendant mining company liable under Chapter 23 of the Laws of 1905, page 51.

Same—Negligence—Pleading and Proof.

5. Plaintiff in a personal injury action is not required to prove each of the particulars of negligence alleged in the complaint; if enough is shown to establish that negligence in any of the particulars charged was the proximate cause of the injuries, a case is made sufficient to go to the jury.

Same—Survival of Action—Instantaneous Death—Recovery of Damages—Instructions.

6. An instruction in an action for personal injuries to an employee of a mine, caused by the negligence of a fellow-servant—which right of action survived to his heirs, under section 5250, Revised Codes—that in determining the amount of recovery the jury were limited *inter alia* to a sum of money which would have compensated the deceased for pain and suffering, if any, between the injury and his death, if he survived the injuries for “any length of time.” was not objectionable where, by the use of the subsequent words “unless you find death was instantaneous,” the jury were correctly informed that there must have been an appreciable period of suffering to warrant recovery on that account.

Same.

7. The right of action which survives to the heirs or representatives of one who dies from injuries received through the negligence of a fellow-servant while working in a mine includes not only damages for the pain and suffering endured by deceased, but also for the loss of earning capacity for the period of his natural expectancy of life.

Same—Safety Cages—Absence of Doors—Evidence—Admissibility.

8. Even though, under section 8536, Revised Codes, mining cages, when used in sinking a shaft, need not be equipped with doors,

and plaintiffs did not claim any right to recover on account of their absence from the one between which and the wall-plates of the shaft deceased was caught while being hoisted, evidence of their absence was nevertheless competent as bearing upon the degree of care required of the engineer, through whose negligence the accident was alleged to have occurred, in lowering and hoisting the cage.

Same—Instructions—When Appellant may not Object.

9. An instruction which, in restricting the use of certain evidence, had the effect of protecting appellant company's rights, was not open to objection by it.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Margaret A. Beeler and others against the Butte & London Copper Development Company. Judgment for plaintiffs. Defendant appeals from the judgment and from an order denying its motion for a new trial. Affirmed.

Messrs. Kremer, Sanders & Kremer, and Messrs. Walsh & Nolan, submitted briefs in behalf of Appellant. Oral argument by Mr. L. P. Sanders and Mr. T. J. Walsh.

It is held by all courts that it is error to permit reference at the trial of a cause to the fact that the defendant may be one insured with some assurance company. That even to permit the jury to gather by way of inference that a defendant carries insurance is reversible error. In the case of *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N. E. 957, we find circumstances very similar to those involved here. (See, also, *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.), 94 S. W. 356; *Harry Bros. Co. v. Brady* (Tex. Civ. App.), 86 S. W. 615; *Lassig v. Barsky*, 87 N. Y. Supp. 425; *Lone Star Brewing Co. v. Voith* (Tex. Civ. App.), 84 S. W. 1100; *Perry etc. Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183; *G. A. Fuller Co. v. Darragh*, 101 Ill. App. 664; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Westby v. Washington etc. Co.*, 40 Wash. 289, 82 Pac. 271; *Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510; *Eckhart etc. v. Schaefer*, 101 Ill. App. 500.)

The evidence is insufficient to sustain the verdict for the reason that no adequate presumptions of fact were established. The gist of the theory set up in the complaint is that McNichols negligently jerked the deceased off the cage. Instead of establishing this by a preponderance of competent evidence, the record discloses that the verdict of negligence was arrived at only by presumption of the most violent kind. The only presumptions the law recognizes are immediate inferences from facts proved, and where a presumption is to arise from a number of connected and dependent facts, every fact essential to the series must be proved. There is no immediate connection between the circumstance that the cage was ascending the shaft when Beeler was caught and the inference or presumption that, to sustain the verdict, must be drawn that the engineer negligently jerked Beeler off the cage. The facts, such as are proved, are as consistent with one as with the other theory; they do not sustain the burden imposed upon respondents. (See *Atchison etc. v. McFarland*, 2 Kan. App. 662, 43 Pac. 788; *United States F. & G. Co. v. Des Moines*, 145 Fed. 273, 74 C. C. A. 553; *Deschenes v. C. & M. R. R.*, 69 N. H. 285, 46 Atl. 467; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305; *Denver etc. v. DeGraff*, 2 Colo. App. 42, 29 Pac. 664; *Murphy v. Hays*, 68 Hun, 450, 23 N. Y. Supp. 70; *Dame v. Laconia Car Co. Works*, 71 N. H. 407, 52 Atl. 864; *Hamilton v. Lake Shore etc.*, 4 Ohio N. P. 249; *Leonard v. Miami Min. Co.*, 148 Fed. 827, 78 C. C. A. 517.) Presumption yields to direct evidence. (*Macarty v. Foucher*, 12 Mart. (O. S.) 114.) Presumptions cannot be indulged in opposition to facts which show that the fact sought to be established by presumption can have no existence. (*Largen v. State*, 76 Tex. 323, 13 S. W. 161.)

The right of recovery in a cause of action for personal injuries which survives, by virtue of a statute, is in the personal representative, and the avails become assets of the estate, unlike the proceeds of a new and independent right of action granted to dependent relatives though prosecuted in the name of the personal representative, though for their benefit. (*Nemecek v.*

Filer etc., 126 Wis. 71, 105 N. W. 225; *Missouri Pac. Ry. Co. v. Bennett*, 5 Kan. App. 231, 47 Pac. 183.) The respondents, the heirs of deceased, have no right of action against the appellant arising out of any survival of a right of recovery in him.

Instruction F is erroneous. Though in the case of an action for personal injuries surviving under the statute, recovery may be had for pain and suffering endured by the deceased, he is not entitled to recover if he survived any length of time, as the jury was told. If such suffering as he underwent was borne only in connection with the immediate incidents accompanying his death, he has no right of recovery. If they are "substantially contemporaneous" with the death, there can be no recovery. (*Barton v. Brown*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727.) The recovery, in a survival action, on account of diminished earning capacity, is to be calculated only for the period intervening between the injury and the death (8 Am. & Eng. Ency. of Law, 912), though as to this the decisions are not in harmony. (*Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623.)

In behalf of Respondents there was a brief by *Messrs. Maury & Templeman*, and *Mr. J. O. Davies*. *Mr. Maury* and *Mr. Davies* argued the cause orally.

The question propounded to the jury relative to their business connections with the casualty company has been before the courts several times, and has always been held to be proper and not prejudicial. (*Hoyt v. Ind. Asphalt Co.*, 52 Wash. 672, 101 Pac. 367; *Grant v. National Ry. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805; *Blair v. M. McCormick Const. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750.)

The evidence by every reasonable intendment discloses the fact that deceased was thrown off the cage by the negligent acts of the engineer. It is true that the evidence is circumstantial, but we contend that circumstantial evidence, based upon the immutable laws of nature, is the strongest and most convincing evi-

dence that can possibly be introduced at the trial of any cause, either civil or criminal.

The explanation of the engineer that the cage did not go below the station is false. It is from a man whose professional reputation is at stake; whose ability to secure future employment is at stake; whose peace of mind during the remainder of his natural life depends on his convincing himself that the facts were different from what the mine inspector opined. Jurors may disregard such testimony. (*Poor v. Madison River Co.*, 38 Mont. 341, 99 Pac. 947.) It was contrary to the laws of nature. Jurors must disregard such testimony. (Moore on Facts, sec. 149.) Such is not uncontradicted testimony. The human word is pitted against the word of God, speaking through His laws of nature.

Counsel for appellant contend that the trial court erred in refusing to direct a verdict for the defendant. They seem to admit that plaintiff made out a *prima facie* case; at least they do not argue any specification of error to the effect that the court erred in overruling their motion for a nonsuit. The court held, upon motion for a nonsuit, that a *prima facie* case had been made out for plaintiffs. The court could not, therefore, direct a verdict for defendants. (*McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999; *Collar v. Patterson*, 137 Ill. 403, 27 N. E. 604; *Van Arsdell's Admr. v. Louisville N. R. Co.* (Ky.), 65 S. W. 858.)

Appellant insists that only nominal damages can be recovered in this case. It insists that the measure of damages for diminished earning capacity "is to be calculated only for the period intervening between the injury and the death." The legislature, in the year 1905, re-enacted the statutes of 1903, adding the survival clause for the express purpose and intention of giving to the estate of the injured person a cause of action, in event of his death. It would be ridiculous to say that the legislature, after taking the trouble of re-enacting the law for the express purpose of giving the estate a cause of action, should intend that the estate should recover only nominal damages. The great

weight of authority is to the effect that the true measure of damages in cases of this kind is the same as though the injured person was alive and prosecuting the action in person. (See *Maher v. Philadelphia Traction Co.*, 181 Pa. 391, 37 Atl. 571; *Broughel v. Southern New Eng. Tel. Co.*, 72 Conn. 617, 45 Atl. 437, 49 L. R. A. 404; *Black v. Griggs*, 74 Conn. 585, 51 Atl. 523; *Hesse v. Meriden etc. Co.*, 75 Conn. 571, 54 Atl. 299; *Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N. W. 623; *Oliver v. Houghton Co. St. Ry. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434, 3 Ann. Cas. 53; *Missouri K. & T. R. Co. v. Elliot*, 102 Fed. 108, 42 C. C. A. 188; *Muldowney v. Illinois Cent. R. R. Co.*, 36 Iowa, 462; *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967.)

HONORABLE SYDNEY SANNER, Judge of the Seventh Judicial District, sitting in place of the Chief Justice, delivered the opinion of the court.

The respondents, heirs of Edwin Beeler, deceased, recovered judgment against the appellant company for damages for personal injuries sustained by him while in the service of the appellant company, as the result of the negligence of a fellow-servant. The cause is now before this court upon appeal from said judgment and from an order denying appellant's motion for a new trial. The transcript assigns sixty-three alleged errors. These, however, are consolidated by the briefs filed on appellant's behalf into a few general propositions which will be reviewed in the order of their presentation.

1. It is urged that the complaint fails to state a cause of action in this: (a) That the action is not maintainable by plaintiffs, since it does not survive to the heirs but only to the personal representatives of the person injured; (b) that the action is upon a liability created by statute, and, having been commenced more than two years after the cause of action accrued, it is barred by the provisions of subdivision 1, section 6449, Revised Codes.

(a) The authority for this action is in the Act approved February 20, 1905 (Chapter 23, p. 51, Laws 1905), re-expressed in sections 5248, 5249 and 5250 of the Revised Codes. In section 5250 it is expressly provided that the right of action shall survive and may be prosecuted and maintained by the heirs or personal representatives of the person injured. The complaint alleges that the plaintiffs are the widow and child, respectively, and that there are no other heirs, of the person injured and since deceased. This is a sufficient answer as to the right of plaintiffs to maintain this suit.

(b) The theory of limitation, as disclosed in the Chapter of the Code on that subject, has no reference to the defenses that may or may not be interposed in resistance to a plaintiff's demand; but it is grounded in every instance upon the nature of the demand itself—whether it be upon a judgment, written contract, account, etc. Subdivision 1, section 6449, must be viewed in the light of the fact that the phrase “liability created by statute” has come to have a fixed application to a class of cases quite distinct from those elsewhere mentioned or referred to in the same Chapter. If the action at bar had been for injuries resulting from the negligence of a vice-principal, instead of a fellow-servant, it would be recognized at once as a straight action in tort, governed, as to its limitation, without any thought of its being a “liability created by statute.” Now, the fact that the injury which is the basis of the action, resulted from the negligence of a fellow-servant instead of a vice-principal does not affect the essential nature of the action; it is still an action for personal injuries founded upon actionable negligence. And while it may properly be said (see *Kelly v. Northern Pac. Ry. Co.*, 35 Mont. 243, 88 Pac. 1009) that under the Act approved February 20, 1905, an employer's liability exists where none existed before, yet the true function of that Act must be regarded, not as creating a new cause of action, but merely to carry forward the right of the injured party and to remove a defense theretofore available in this class of causes (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960). It fol-

lows that in the sense employed by the Chapter on limitations of actions, this is not an action on a "liability created by statute," and the contention that it is barred by subdivision 1, section 6449, is not sound. Such being our conclusion, it is unnecessary to consider whether, under the conditions presented by the record, the statute of limitations could be available to appellant in the absence of a special plea thereof.

2. In the selection of the jury respondents were permitted to ask each of the jurors whether they had any business relations with the Casualty Company of America. Apparently respondents deemed this information necessary as an aid to the intelligent exercise of their peremptory challenges. It does not appear that either the purpose or tendency of these questions was to inform the jury that the burden of a judgment, if obtained, would fall on an insurance company instead of the defendant, and the company was not afterward mentioned in the case. The first time the question was asked, no objection whatever was made, and we are unable to see how the appellant could have been prejudiced by the examination. (*Hoyt v. Independent Asphalt Co.*, 52 Wash. 672, 101 Pac. 367.)

3. It is assigned as error that the district court denied appellant's motion for a directed verdict. This assignment, with that based on the refusal of a new trial, brings up the main question whether the whole case presents a sufficient fact basis for the verdict of the jury.

On the 11th of November, 1906, appellant's shaft was divided into three compartments, the center one accommodating the cage, the east one containing the pumps, and the west one containing a steam pipe-line; and at a point 640 feet below the surface, commonly called the "Six Hundred," there was a controlling valve in the steam line in the west compartment. The station is electric-lighted, and here, as well as at intervals of about 100 feet above, are wall-plates made of 12x12 timbers, which the cage, in passing, would clear by from three to five inches, a space wholly insufficient to admit the passing of an adult human body. To reach the valve in the steam line, a pumpman would neces-

sarily proceed to the "Six Hundred," step from the cage to the wall-plate on the north at or near the northwest corner of the center compartment, thence into the west compartment to the ladder close to the corner; it would take from two to four minutes to close this valve. The cage was a sinking cage, and had no gates; it was operated by means of an engine and cable which were under the control of the engineer who was stationed where he could, and often did, observe it at the surface. The engine, cable, cage, and shaft were all in normal, safe condition. Fifty-five or sixty feet below the "Six Hundred" was the bottom of the shaft, where men were working; water was dropping, and there was water in the shaft and the pumps were at work drawing it out.

On the morning of the day above referred to, Edwin Beeler, a pumpman in appellant's employ, was sent by one O'Neal, his boss, to prime a pump at the "Four Hundred," and after that proceed to the "Six Hundred" and shut off the steam line there. He proceeded to the "Four Hundred," was there about fifteen minutes, primed the pump, passed some remarks with one Simmons, took the cage, rang for the "Six Hundred," and descended. About half an hour after this O'Neal, finding the steam line still open, signaled from the bottom of the shaft for the cage, and, not receiving it, he ascended the shaft by means of the ladder, arrived at the "Six Hundred," and there found Beeler dead, bound tight between the lower edge of the north wall-plate and the upper edge of the bottom of the cage, the floor of the cage being about four inches up on the wall-plate. The cage was rigid, and it was necessary to lower it to remove the body; "it seemed to have him by the breastbone and the lower short ribs, square * * * he was bound in that tight that there wasn't a tremor in the cage at all." His body was held almost erect, his head thrown slightly backward, the hat still on it; both hips were below the floor of the cage but the left leg was drawn up so that the kneecap was above the floor of the cage; his clothing was drawn or bunched sharply upward; he had been dead some time. There was no blood, except a little

froth from the mouth, nor marks of injuries except crosswise at the point of the breastbone, which were not cuts but a crush; the lower ribs were broken at that point. There were no wounds on the legs or around the region of the hips, front, or rear or sides. The internal organs of the lower abdomen, everything in the abdominal cavity seemed to be pushed up. No one saw the accident or heard any outcry. At the time of the accident Beeler was twenty-seven years old, in good health, sober, steady, and industrious, competent in his business, capable of earning \$150 a month, and with a life expectancy of thirty-six years. The injuries sustained by him were such as to totally incapacitate him and to cause his death. It does not appear that death was instantaneous, but, on the contrary, we think there is sufficient competent evidence in the record to support the conclusion that he lived an appreciable time after the injuries were sustained.

From the foregoing it is quite clear that the accident occurred while the cage was in the upward motion. In this connection the testimony of the engineer, McNichols, is interesting. Called first for the respondents, he says: "The signal I got just before Beeler went down on his last trip was a signal from the surface to the 'Four Hundred,' and from the 'Four Hundred' down to where he was found. * * * I felt nothing caught after that. * * * When I got the signal to lower to the point where Mr. Beeler was caught, I proceeded to lower. The cage remained at that point perhaps half an hour. There were no signals given me from below after that." If this be true, it is hard to understand why he ordered a "flash" for the cage or gave the "shake-up" signal. Called in behalf of the appellant, he testified thus: "I lowered the cage to the 'Four Hundred,' stopped there a few seconds, probably a minute. Then I received a signal to lower it down to this pump, down 230 or 240 feet below that. That is the place that is commonly called the 'Six Hundred.' I lowered to this mark, and the cage remained there perhaps ten or fifteen minutes; and the miners in the bottom of the shaft then rang for the cage. * * * I told

the top man to flash for the cage; * * * we didn't get any answer, and after awhile I signaled by moving the cage up and down a few inches. * * * The cage must have been at this 'Six Hundred' thirty minutes at least, and perhaps forty minutes from the time I lowered it until the time I gave the last signal. When I lowered the cage to this point I lowered it in the manner I always did, just as usual, in a careful manner; * * * it was slow enough. I did not get any unusual movements at the time. I did not carry the cage a considerable distance out of its point; I did not carry it over two inches; I stopped it right on the point. I did not rapidly reverse my engine. I did not jerk the cage. I did not suddenly raise the cage. I did not jerk or handle the cage in any manner that could possibly jerk anyone from the cage. I did not raise the cage a considerable distance, enough to crush anyone against the timbers or against the sides of the shaft. I did not raise the cage at all after I stopped it, any more than signaling him and gave him probably two or three inches, or three or four, something like that. * * * I did not move that cage at all, except to give that shaking-up signal, for thirty minutes from the time I stopped it down at the point of this 'Six Hundred' pump level until I got a signal to bring and raise the cage by the men who went from the bottom up to the cage and found Mr. Beeler's body there. * * * When a pumpman has the cage in the shaft and an engineer gets a signal from other persons to send them the cage, the engineer will customarily wait a while if they think he is going to be through. We may wait a few minutes and then 'shake up' or move the cage a little bit to get a clearance bell. This movement is not sufficient to jar anyone on the cage that might be on it."

If the "shake-up" was given as McNichols says it was, we agree that it was inadequate to cause the accident. The conclusion is that either the "shake-up" was not so given, or the accident occurred when the cage was in the upward motion at some other time and under circumstances of such a character that McNichols deemed it necessary to deny the circumstance at all.

This court is not unmindful of its oft-repeated declarations that negligence cannot be established by mere conjecture. But there is an obvious distinction between this case and that of *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243, as well as the other cases in this state in which that rule has been announced. We have here no mere congeries of assumption and presumption, such as appellant would have us believe. When we consider that apart from the "shake-up," the cage had no business to ascend without a signal after it had once stopped for the "Six Hundred"; that the engineer who controlled it says it did stop right at the mark, that he got no signal to move it; that it was not moved except for the "shake-up"; that the physical facts demonstrate that it was moved up from below the wall-plate at the "Six Hundred"; that the "shake-up" as performed could not have accomplished Beeler's injuries; that the engine, cable, cage and shaft were all in normal condition—we have a case, not of conjecture, but of direct and circumstantial evidence sufficient to warrant the jury in saying that the injuries to Beeler were caused by a movement of the cage such as could not have occurred except through the mishandling of this appliance by the engineer.

It is strenuously insisted, however, that the complaint alleges that the engineer "negligently jerked Beeler off the cage" and there is no proof of this; that so far as the evidence shows, Beeler may have fainted or slipped or got between the cage and the wall-plate in some other way than as alleged in the complaint. If all this were true, it still misses the point, which is, that through the negligent mishandling of the engine, cable, and cage by the engineer, Beeler was crushed. If an upward motion of the cage from below the wall-plate caused the crushing of Beeler, and if such motion occurred through the negligence of the engineer, we need not know just how Beeler got between the wall-plate and the cage. It was not necessary for respondents to prove each of the particulars of negligence alleged in the complaint; if enough were shown to establish that the negligence of the engineer in any of the particulars alleged was the proximate cause of

Beeler's injuries, then a case was made sufficient to go to the jury. (*Riley v. Northern Pacific Co.*, 36 Mont. 545, 93 Pac. 948; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988.)

4. Complaint is made of instruction F, as follows: "The court instructs the jury that if under all the evidence and all of the instructions of the court your verdict should be for the plaintiffs and against the defendants, then it will be necessary for you to assess and write into that verdict the amount of damages caused proximately to Edwin Beeler by the acts, if proven, of the hoisting engineer. In determining this amount you are limited to a sum of money which would have compensated Edwin Beeler for the pain and suffering of mind and body which the injuries caused (if any such pain and suffering were caused), between the time that he was injured and the time he died, if he survived the injuries for any length of time, and to the further sum that would have compensated him, unless you find that death was instantaneous, for the impairment, if any, which was caused by the injuries, of his capacity to earn money in the future if he had not been injured. Now, gentlemen, the amount sued for and claimed in the complaint of \$25,000 must not be to you any criterion in determining the amount of your verdict, if you do render any, in favor of the plaintiffs, but I charge you that in no event shall your verdict be in excess of the amount of \$25,000."

We see no error here. The phrase "any length of time" read in juxtaposition with the phrase "unless you find death was instantaneous" makes it clear that the court intended to advise the jury that there must have been an appreciable period of suffering. The statute authorizing this suit gives to the heirs the right to prosecute and maintain the same action that the injured man could have maintained had he lived. Unquestionably, his right of action included damages for the pain and suffering that he endured and for his diminished and lost earning capacity for the period of his natural expectancy. No reason exists why the scope of the action should diminish because of his

death; to inject such a change into the statute would do violence to its language, and would, *pro tanto* at least, destroy its very purpose. (*Kyes v. Valley Telegraph Co.*, 132 Mich. 281, 93 N. W. 623; *Oliver v. Houghton County St. Ry. Co.*, 134 Mich. 367, 104 Am. St. Rep. 607, 96 N. W. 434; *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960.)

5. Error is predicated on the admission of evidence that the cage was without gates. It was a sinking cage, and required no gates, nor was any claim of right to recover based upon their absence. The evidence was admitted, not as ground for recovery, but as showing the physical condition of the cage and the engineer's knowledge thereof as bearing upon the degree of care he was required by the circumstances to exercise in the handling of the cage. In this we see no error. Nor is any error apparent in instruction X. It plainly told the jury that "the evidence that the cage was without gates was admitted solely upon the question of the measure of care the engineer should use in lowering and hoisting the same." This instruction was protective of appellant, and the objections to it are hypercritical.

6. Careful consideration and full investigation have been given to the other assignments discussed in the briefs of appellant. We cannot find that any of them are of a character to justify a reversal of this case.

No prejudicial error appearing of record, it is ordered that the judgment and order of the district court be affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

Rehearing denied September 17, 1910.

NEARY ET AL., RESPONDENTS, v. NORTHERN PACIFIC
RAILWAY CO. ET AL., APPELLANTS.

(No. 2,851.)

(Submitted June 22, 1910. Decided July 6, 1910.)

[110 Pac. 226.]

*Personal Injuries—Railroads—Cities and Towns—Speed of
Trains—Ordinances—Validity—Pleadings—Theory of Case—
Complaint—Wanton Negligence—Surplusage—Law of the
Case—Instructions—Licenses—Contributory Negligence—
Proximate Cause—Excessive Verdict—Cost Bill—Amend-
ments.*

Personal Injuries—Railroads—Cities and Towns—Speed of Trains—Or-
dinances—Validity—Pleading.

1. To enable the defendant railroad company to show that an ordinance regulating the speed at which trains could be run within the city limits was void, because unreasonable, when applied to that portion of its yards where the accident occurred which gave rise to a personal injury action, it should have pleaded the facts upon which such claim was based.

Same—Theory of Case—Review.

2. Respondent cannot be said to have acquiesced in the trial of a cause upon the theory that it included an issue not made by the pleadings, by permitting evidence to be received without objection, where the purpose of offering the evidence was not explained at the time, and where it was apparently material and competent as bearing upon issues other than the one not raised by the pleadings.

Same—Law of the Case—What Constitutes.

3. Where upon a former appeal in a personal injury case it was held that under the evidence the cause should have been submitted to the jury, and that the court erred in directing a verdict for defendant, and upon the second trial the testimony was substantially the same as that adduced at the first, the former decision was the law of the case, and the court properly followed the court's direction in this respect.

Same—Complaint—Wanton Negligence—Surplusage.

4. *Held*, that under an allegation in the complaint that defendant acted so "wantonly and grossly carelessly and negligently" in the running of one of its trains as to cause the death of plaintiffs' intestate, a recovery may be had upon proof of ordinary negligence only, the adverbs "wantonly" and "grossly" being treated as surplusage.

Same—Instructions—Law of the Case.

5. Since a decision of the supreme court, whether right or wrong, is the law of the case on a second trial, an instruction couched in language substantially the same as that used by that court in dis-

posing of one of appellant's contentions was properly given on the retrial.

Same—Licensee—Evidence—Insufficiency.

6. Evidence *held* to show an agreement between defendant railroad company and a connecting line, under which the employees of the latter could use the tracks of the former in making up and operating trains, and that therefore deceased, a freight train conductor in the employ of the latter company, who was killed while engaged in checking his train standing on defendant's tracks, was not a mere licensee to whom defendant did not owe the duty of keeping an active lookout for his presence on the tracks.

Same—Operation of Trains—Care Required.

7. Though, generally speaking, no duty rests upon a locomotive engineer to stop his train whenever he sees a person on the track, but he may presume in the first instance that such person will heed the usual warning signals and take a place of safety, yet where an engineer saw decedent on the track, apparently so engrossed in his duties as to pay no attention to signals, and, upon sounding the whistle when 600 feet away, ran over 450 feet after applying the emergency brake, though he could have stopped within 300 feet, the question whether under all the facts and circumstances he was justified in acting upon the presumption above referred to, was one for the jury, and a charge that under the circumstances of this case it was the duty of the engineer to use reasonable care to discover decedent's peril was proper.

Same—Contributory Negligence—Proximate Cause.

8. The contributory negligence of a plaintiff or deceased person which will operate to defeat a recovery must have been such as directly contributed to the injury at the time it was inflicted; his negligence must have been a proximate cause of the injury.

Same—Excessive Speed of Trains in Cities—Negligence *Per Se*.

9. The running of a railroad train in a city in excess of the rate of speed fixed by ordinance is negligence *per se*, and where this lapse of duty directly contributes to an injury, liability attaches to the person responsible therefor.

Same—Cities and Towns—Excessive Speed of Trains—Proximate Cause of Injury.

10. Where owing to the excessive rate of speed at which a train was run within the city limits, contrary to the provisions of an ordinance, both before and after discovery of the peril of deceased, a freight conductor who was so absorbed in checking his train as not to notice the approach of the train on the track on which he was standing, the locomotive engineer was unable to stop so as to avoid the accident, the inability of the engineer to bring the train to a stop because of the violation of the ordinance, and not the contributory negligence of deceased in placing himself in a situation of danger, *held*, to have been the proximate cause of the accident.

Same—Duty of Railway Engineer Approaching City Limits.

11. An engineer in charge of a railway locomotive who, on approaching the limits of a city or town at a speed prohibited by ordinance, observes a person upon the tracks over which he is about to pass, must instantly reduce his speed to the ordinance limit, and may not rely upon the presumption that such person will upon signal assume a place of safety.

Same—Excessive Verdict—What Does not Constitute.

12. A verdict of \$25,000 as damages for the negligent killing of a freight train conductor, whose expectancy of life was twenty-nine years, and whose monthly earnings had been \$150, *held* not excessive. Where a verdict, claimed to be excessive, is capable of being arrived at by mathematical calculation, the elements of passion and prejudice will not be presumed to have influenced the minds of the jurors.

Cost Bill—Amendment—Refusal—When Abuse of Discretion.

13. Under section 6589, Revised Codes, granting it power to allow amendments, the district court abused its discretion in refusing to permit an amended memorandum of costs to be filed, in which not any new items were sought to be added to the original, but the sole purpose of which was to furnish the objecting party with information relative to alleged expenditures, the absence of which from the original was claimed to be prejudicial. A showing of inadvertence, surprise or excusable neglect was not necessary in order to warrant the allowance of the amendment.

Same—Cost Bill—Amendment, When Considered as Made.

14. Where the district court abused its discretion in refusing an amendment to a cost bill to be filed, the supreme court on appeal will treat it as if it had been filed.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

ACTION by Marie Neary, widow and heir at law of James S. Neary, deceased, and others, minors and heirs at law of the deceased, by their guardian *ad litem*, Marie Neary, against the Northern Pacific Railway Company and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines submitted a brief in behalf of Appellants. Mr. Wallace argued the cause orally.

The gravamen of respondents' case was the wanton action of defendants resulting in the death of Neary. Having elected to recover upon this state of facts, the proof must support the allegations of wantonness. (*Robinson v. Helena L. & Ry. Co.*, 38 Mont. 242, 99 Pac. 837; *Cleveland etc. Ry. v. Ricker*, 116 Ill. App. 428; *Montgomery etc. Ry. v. Rice*, 142 Ala. 674, 38 South. 857.) Having averred that the defendants acted grossly wantonly in the premises, proof of any lesser degree of negligence would not support a verdict. (*Turtenwald v. Ice Co.*, 121 Wis. 65, 98 N. W. 948; *Wilson v. Chippewa etc. Ry. Co.*, 120 Wis.

636, 98 N. W. 536, 66 L. R. A. 912; *Levin v. Railway*, 109 Ala. 332, 19 South. 395; *Railway v. Crocker*, 95 Ala. 412, 11 South. 262; *Louisville etc. Ry. v. Hurt*, 101 Ala. 34, 13 South. 130, and *Highland Ave. etc. Ry. v. Winn*, 93 Ala. 306, 9 South. 509; *Indiana etc. Ry. Co. v. Overton*, 117 Ind. 253, 20 N. E. 148; *Louisville etc. Ry. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Chicago etc. Ry. v. Dickson*, 88 Ill. 431; 29 Cyc. 588.)

The court erred in refusing to give defendants' offered instruction No. 8, by which instruction the defendants requested that the doctrine of the last clear chance of averting the accident, in this instance, be limited to the possibility of so doing after actual discovery, as distinguished from possibility of discovery. The defendants could only be held liable for their wanton failure to avoid the accident after Neary's presence and peril were shown to have been actually known by them. (See *Keefe v. Chicago etc. Ry. Co.*, 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 504; *Louisville etc. Ry. v. Young*, 53 Ala. 252, 45 South. 238, 16 L. R. A., n. s., 301; *Barry v. Railway*, 77 Ark. 401, 91 S. W. 748; *Ruppel v. Railway*, 10 Cal. App. 319, 101 Pac. 803-805; *Denver etc. Ry. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106; *Tully v. Railway*, 2 Penne. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; *Freitag v. Railway* (Ind. App.), 89 N. E. 501; *Pierce v. Walters*, 164 Ill. 560, 45 N. E. 1068; *Jones v. Railway*, 121 Ala. 39, 46 South. 61-64; *Tennis v. Railway*, 45 Kan. 503, 25 Pac. 876; *Bouwmeester v. Railway*, 63 Mich. 557, 30 N. W. 337; *Atwood v. Railway*, 91 Me. 399, 40 Atl. 67; *Erickson v. Railway*, 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786; *Morehead v. Railway*, 84 Miss. 112, 36 South. 151; *Camden etc. Ry. v. Young*, 60 N. J. L. 193, 37 Atl. 1013; *Sweeney v. New York Steam Co.*, 117 N. Y. 642, 22 N. E. 1131, affirming 6 N. Y. Supp. 528; *Louisiana etc. Ry. v. McDonald* (Tex. Civ. App.), 52 S. W. 649; *Eastburn v. Railway*, 34 W. Va. 681, 12 S. E. 819; *Valin v. Railway*, 82 Wis. 1, 33 Am. St. Rep. 17, 51 N. W. 1084.)

The question of the validity of ordinances, such as the one involved here, where there is no dispute in the evidence as to facts, is one for the court. (33 Cyc. 668, cases noted; 2 Elliott on Rail-

roads, sec. 670; *Evison v. Chicago etc. Ry.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 437; *Lakeview v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268; *Meyers v. Railway*, 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 897.)

In behalf of Respondents there was a brief by *Messrs. Walsh & Nolan* and *Mr. E. E. Enterline*. *Mr. T. J. Walsh* and *Mr. Enterline* argued the cause orally.

If the appellants intended to insist that at the particular place at which the deceased was killed the ordinance was, for any reason, inoperative, they should have set out in their answer the facts and conditions which make it so. (See *Kunz v. Oregon R. & N. Co.*, 51 Or. 191, 93 Pac. 141, 94 Pac. 504; *Gratiot v. Missouri P. Ry. Co.* (Mo.), 16 S. W. 384, 19 S. W. 31, 21 S. W. 1094, 16 L. R. A. 189.) The rule of the law of the case forbids any inquiry into the question of the validity of the ordinance. Questions which were once determined or conceded on the hearing in an appellate court will not be considered on a second appeal or writ of error. (*Roth v. Mutual Reserve L. I. Co.*, 162 Fed. 282.) The rule of the law of the case extends not only to all points of the controversy touched upon in the opinion, but to all questions raised by the record and necessarily involved in the decision. (*Oldig v. Fisk*, 1 Neb. (Unof.) 124, 95 N. W. 492; *Scottish American Mtg. Co. v. Reeve*, 7 N. D. 552, 75 N. W. 910; *Wastl v. Montana U. Ry. Co.*, 24 Mont. 159, 61 Pac. 9.) On a demurrer to evidence, the ruling of the court on appeal extends to every question which could have been raised when the cause was first submitted to the public tribunal. (*Dunn v. Nicholson*, 125 Mo. App. 725, 103 S. W. 114.)

Wherever, in the exercise of reasonable care and diligence, an engineer, charged with the operation of a contrivance as deadly as a moving locomotive, ought to have discovered the peril of some one on the track ahead of him, apparently oblivious of his danger, a recovery may be had, though a want of due care might be charged against the person imperiled. This court not only so declared on the former appeal, but it asserted the like rule in

Riley v. Northern Pac. Ry. Co., 36 Mont. 545, 93 Pac. 948, and thereby put itself in harmony with the more modern and best considered cases, such as *Nichols v. Chicago etc. Ry. Co.*, 44 Colo. 501, 98 Pac. 808; *Trigg v. Water, Light & Transit Co.*, 215 Mo. 521, 114 S. W. 972, 20 L. R. A., n. s., 987, and *Philadelphia & R. R. Co. v. Klutt*, 148 Fed. 818, 78 C. C. A. 508.

MR. JUSTICE SMITH delivered the opinion of the court.

This is the second appeal of this case. (*Neary v. Northern Pacific Ry. Co.*, 37 Mont. 461, 97 Pac. 944, 19 L. R. A., n. s., 446.) Upon the first trial the district court of Yellowstone county directed a verdict for the defendants, and judgment in their favor was entered accordingly. This court reversed the judgment, and remanded the cause for a new trial. It was held (1) that the deceased, Neary, was guilty of contributory negligence, and (2) that the cause should have been submitted to the jury upon the question of the defendants' negligence in failing to use reasonable care to avail themselves of the last clear opportunity to avoid the catastrophe. The second trial resulted in a verdict for the plaintiffs in the sum of \$25,000 damages. From a judgment entered thereon and an order denying a new trial, the defendants have appealed.

The main facts in the case are fully set forth in the former opinion of the court, prepared by the chief justice. As to the statement therein contained it is now said by counsel for the appellants, in their brief: "As the statement of facts so fully set forth in the court's opinion will be sufficient for practically all the purposes of a statement in this brief, we will herein adopt that statement, with three exceptions: (1) The first of these exceptions is the apparent assumption, as an established fact, that Neary was upon the tracks of the defendant railway company in the discharge of his duties and with the express consent of the railway company. We claim that it can neither be assumed nor found as a fact that the employees of the C., B. & Q. Railway Company used the tracks and switches of the defendant company's yards, by agreement, as charged in the complaint,

that the said employees in so using the yards frequently walked across and along the tracks, and that the railway company and its servants had 'full knowledge and notice of said fact.' (2) The statement of facts in the decision contains the following language: 'The yards extend through the central portion of the city, and for most of the distance—several thousand feet—lie within the city limits.' As far as it goes, this statement is correct; but upon the second trial it was established in addition that the yards of the company were inclosed with fences, from practically Twenty-ninth street (the first street east of where the accident happened) to a point about 6,680 feet west thereof, and that in this distance there is not a single street crossing of any kind through the yards. Also, that the west limits of the city were several thousand feet east of the public road crossing at the point 6,680 feet west of Twenty-ninth street. (3) The third exception is that considerably more evidence was introduced bearing upon the question of the ability of the engineer to have stopped his train after he discovered that Neary was not conscious of his approach, which, while conflicting, would not warrant a finding that the engineer was 'wantonly and grossly' negligent in his actions."

1. At the second trial the ordinance of the city of Billings declaring it to be unlawful to move trains within the city limits at a rate of speed exceeding six miles per hour was offered in evidence and objected to by defendants' counsel on the ground "that the ordinance is unreasonable and not within the power of the city council, as applied to the defendants in these yards, for the reason that there is no open crossing on said tracks for approximately 2,000 feet, used by the public eastward of this accident, and approximately 4,250 feet or three-quarters of a mile westward. The yards were inclosed by a fence, and were the private yards of the company, not used by the public. The only tendency of the evidence would be to prove primary negligence and that would be immaterial in this case." The court overruled the objection.

The first point urged is fully explained by the phraseology of the objection itself, and will be considered at this time. The

second will be taken up hereafter when we come to consider the effect of the contributory negligence of which it has been held the deceased was guilty. It is earnestly contended that the ordinance, in view of the additional facts brought out at the second trial, is unreasonable, inoperative, and void in so far as it is sought to apply the same to the place where Neary was killed, and the following cases are cited in support of the contention: *Evison v. C., St. P. etc. Ry. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; *Burg v. Chicago etc. R. Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Meyers v. Chicago, R. I. & P. R. Co.*, 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; *City of Plattsburg v. Hagenbush*, 98 Mo. App. 669, 73 S. W. 725; *Southern Indiana Ry. Co. v. City of Bedford*, 165 Ind. 272, 75 N. E. 268; *White v. St. Louis etc. Ry. Co.*, 44 Mo. App. 540; *Zumault v. K. C. & I. Air Line*, 71 Mo. App. 670; *Kunz v. Oregon R. & N. Co.*, 51 Or. 191, 93 Pac. 141. On the part of the respondents it is insisted (a) that the ordinance was considered by this court as an essential feature of the case upon the last appeal, and, the facts relating to the physical situation in the Billings yards being substantially the same at both trials, the court is precluded by the law of the case from giving consideration to the appellants' objection to the ordinance on this appeal; (b) that there is no pleading on the part of the defendants which will warrant them in raising the question presented. We are of opinion that this latter position is well taken, and it will not, therefore, be necessary to consider the respondents' first contention.

It is alleged in the complaint that on the date of the accident there was "in force in the city of Billings" the ordinance in question, which had been duly enacted. This allegation is met by a general denial on the part of the appellants. It is asserted by counsel that their denial that the ordinance was "in force" gives the right to contend that it is unreasonable and void as applied to this particular portion of the city's area. We are unable to agree with them in this. To us it seems clear that the denial in the answer simply raises the question as to whether any such ordinance as that referred to in the complaint was in

existence at the date in question. The ordinance did in fact exist; it was offered in evidence. If for any reason the defendants desired to take the position that, on account of peculiar physical conditions, it ought not to be considered as in force and effect in a particular portion of the city, to-wit, that part of the Billings yards wherein it was claimed to have been violated, they should have set forth the facts upon which their claim of an exception from the operation of the ordinance was based. (See *Kunz v. Oregon R. & N. Co.*, *supra*.)

It is urged by appellants' counsel in their reply brief that as the evidence offered by them relating to the nature of the country to which the ordinance *prima facie* applied was admitted without objection, while they objected to the ordinance, the court's charge thereon, and the refusal of their offered instructions as to the same, a theory of the case was thus established in the court below which may not be departed from in this court, and, as the case was tried as if the issue was made, it is now too late to urge the contrary (citing *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994). We, however, are unable to determine that any such theory was adopted in the district court. It is true that the testimony referred to was received without objection, but the purpose of offering it was not explained at the time, and apparently it was material and competent as bearing upon other issues in the case. The ordinance itself was offered generally, and the court gave no reason for its ruling on appellants' objection. For aught we know, the point now raised by the respondents may have been the basis of that ruling.

2. Defendants, at the trial, after all of the evidence had been submitted, moved the court for an order directing a verdict in their favor. The motion was properly denied. The testimony at the second trial was substantially the same as at the first. This court held that the case should be submitted to the jury, and the trial court properly followed that direction. Under these circumstances the former decision established the law of the case. (*International Boom Co. v. Rainy Lake River Boom Co.*, 104 Minn. 152, 116 N. W. 221; *O'Neill v. Northern*

Assur. Co., 155 Mich. 564, 119 N. W. 911; *Easterly v. Jackson*, 36 Mont. 205, 92 Pac. 480.)

3. The complaint is peculiar in its averments. It alleges that "the said defendants then and there unlawfully and grossly negligently and wantonly omitted to give any signal by bell or whistle," and "ran and drove the said train at a rate of speed grossly negligently and wantonly high," and "unlawfully, wantonly and grossly carelessly and negligently drove and ran said locomotive and train upon and over the said Neary." The court, at the request of the plaintiffs, gave certain instructions to the jury, in no one of which was any reference made to the necessity of proving that the negligence of defendants must have been of the quality designated as "grossly wantonly," etc. These instructions furnished the jury direct authority to return a verdict in favor of the plaintiffs even though they believed the defendants guilty of simple, or ordinary, negligence only. The defendants requested the court to charge, in effect, that, unless the jury found them guilty of gross and wanton negligence and recklessness, the plaintiffs could not recover. This the court refused to do. Error is assigned upon the ruling. This court in the case of *Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837, said: "The rule contended for by counsel, that where the allegation is of willful or wanton wrong, proof of simple negligence will not justify a recovery, is, we think, founded upon correct reason, and is supported by the great weight of authority." It is claimed that this case falls within the rule there laid down. But there is something more in the complaint than a single allegation of reckless and wanton conduct on the part of the defendants. It may, perhaps, be admitted, as suggested by counsel for respondents, that in a case where no recovery could be had except by showing a willful wrong or such wantonness as would require or justify the inference of a purpose to injure, a recovery could not be had upon an averment of simple negligence; and, on the contrary, that if the complaint charged a willful and deliberate purpose to inflict a wrong, without any allegation that the injury was occa-

sioned by careless inadvertence, a variance would exist if the proof showed the injury to have resulted solely from simple negligence. The allegation here is that the defendants acted "unlawfully, wantonly and grossly carelessly and negligently." The word "unlawfully" undoubtedly refers to the alleged violation of the city ordinance. A willful act involves no negligence. It is a contradiction in terms to say that an act was done "willfully and negligently." The distinction was pointed out not only in the *Robinson Case*, but in the case of *Howie v. California Brewery Co.*, 35 Mont. 264, 88 Pac. 1007, as well. The adverbs employed in this pleading were so arranged as to make it difficult to determine whether they were intended to qualify the verbs "drove" and "ran," or to qualify each. If we omit the first four found in the last allegation quoted above, we have left the averment that the defendants "negligently drove and ran said locomotive engine and train upon and over said Neary."

In the case of *Turtenwald v. Wisconsin Lakes Ice etc. Co.*, 121 Wis. 65, 98 N. W. 948, called to our attention by appellants' counsel, the court said: "It would be far safer, in drafting a complaint in an action like this, to appreciate that a claim for an injury *wantonly* inflicted is one thing, and one for injury attributable to mere actionable negligence is a far different thing; and if it is desired to state a cause of action of the latter character, the pleader should omit all such words as 'willful, reckless and malicious' as regards the conduct of the defendant." We consider this sound advice. In that case the complaint charged that the servant of the defendant acted "carelessly, recklessly, negligently, willfully and maliciously." The court also said: "The complaint admits of a construction charging defendant with being guilty of a greater wrong than mere failure to exercise ordinary care. However, on the whole, it seems the parties on both sides, notwithstanding the peculiar language of the complaint, treated the action in the court below and in this court as one to recover compensation for damages attributable to ordinary negligence. In that situation it seems we are war-

ranted in treating the case in the same way, notwithstanding the charge of negligence is coupled with charges of reckless, willful and malicious conduct." And so in this case, the charge of negligence is coupled with a charge of wanton conduct, or perhaps it was intended to charge "wanton negligence." We are satisfied that under a charge of gross negligence a recovery may be had upon proof of ordinary negligence. (*Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *Keating v. Detroit etc. R. Co.*, 104 Mich. 418, 62 N. W. 575; *Hays v. Gainesville etc. Ry. Co.*, 70 Tex. 602, 8 Am. St. Rep. 624, 8 S. W. 491; *Faulkner v. Kean* (Ky.), 32 S. W. 265; *Pendly v. Illinois C. R. R. Co.* (Ky.), 92 S. W. 1.) The word "gross" would simply be treated as surplusage. The case is simplified by the fact that the pleader omitted to use the word "willfully." "Wantonly," as here employed, falls short of meaning intentionally. It means "recklessly" or "heedlessly." We are of opinion that all of these adverbs may be regarded as intended simply to convey the idea that the defendants were guilty of an extraordinary degree of negligence, if they qualify "negligently," the last one used, at all, which may be doubtful. If we are correct in this conclusion, they may all be treated as surplusage, under the rule laid down in *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976; *First National Bank of Portland v. Carroll*, 35 Mont. 302, 88 Pac. 1012; *Hoskins v. Northern Pacific Ry. Co.*, 39 Mont. 394, 102 Pac. 988; *Cassidy v. Slemons & Booth*, ante, p. 426, 109 Pac. 976. It may also be observed, in this connection, that the facts showing the relative situations of the defendant Frost, and the deceased Neary, at and before the time of the accident, the condition of the railroad yards, the relation which Neary bore to the Northern Pacific Railway Company, and the circumstances under which he was killed, are fully set forth in the complaint, in addition to those allegations, heretofore quoted, wherein the pleader attempted to characterize the acts of the defendants.

But it is said in appellants' reply brief (relying upon sections 5253, 5295, 5300, 5306, 5331, 5354, and 5355, Revised Codes, and

the cases of *Prosser v. Montana Central Ry. Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814, and *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642), that a distinction between degrees of negligence is recognized in this state. Even so, we are of opinion that, under an allegation of gross negligence, any lesser degree of negligence may be relied upon for recovery.

4. The court gave the following instructions to the jury:

“No. 7. As a general rule contributory negligence on the part of the deceased is fatal to a right of recovery in actions such as this. But it is not an invariable rule that, where one through his own negligence puts himself into a place of danger, a right of recovery is denied to him or to his heirs or representatives in case of his death because of injuries inflicted by another. The general rule that one's own negligence in such case precludes a recovery is subject to the qualification that where the defendant has discovered or should have discovered the peril of the position of the one killed, and it is apparent that he cannot escape therefrom or for any reason does not make an effort to do so, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury; and if this is not done, he becomes liable, notwithstanding the negligence of the injured party or deceased. And this is true not only as to the trespassers upon a railway track in the way of passing trains, but also as to employees who may become so absorbed in their duties that they do not observe the signals. In no case may the railway company, after the peril becomes apparent to those in charge of a train, and especially so after it is obvious that the danger is not appreciated by the person in the perilous situation, omit any reasonable effort to stop the train and prevent injury.

“No. 8. Accordingly, if you find that the defendant Frost saw the deceased upon the track, and saw that for any reason he was not making an effort to leave it after the usual warning of the approach of the train had been given by blowing the whistles, and he could by the exercise of all reasonable care, after he recognized or ought in the exercise of reasonable care to have recognized that the deceased was apparently oblivious

of his danger, have stopped the train in time to have avoided striking him, the negligence of the deceased in going upon the track or in not leaving it after being warned, will not prevent a recovery in this case."

"No. 10. It was the duty of the engineer if he saw the deceased on the track to give the usual warning signals, at such a distance as that if they should not be heeded there would remain time, considering the speed at which the train was going, to stop it before striking the deceased. If, accordingly, you find that after discovering that the deceased did not heed the signals given the defendant, Frost was not able with the means at his command to stop the train in time to avoid the casualty, you will consider whether he ought not in the exercise of reasonable care to have given the signals earlier, and if he ought to have done so, and had he done so, he would have been able to make a timely stop, the defense of contributory negligence is not available to defendants, and your verdict should be returned accordingly."

Instruction No. 7 was objected to by the defendants on the ground that it submitted to the jury "an alleged duty in the respect that the engineer or defendant should have discovered the peril of the position of deceased without regard to actual discovery, whereas the doctrine of last clear chance only begins upon the actual discovery of the perilous position of deceased." No. 8 was objected to for the same reason, and for the additional reason that "it ignores the doctrine of preponderance of the evidence and permits the jury to make findings from this source." No. 10 was objected to "for the reason that it deals peculiarly with the question of primary negligence in not sounding and signaling, and in not sooner discovering the deceased, and also because it ignores the doctrine of contributory negligence, and also because it permits the jury to make their findings from any source. Also, because it would wipe out any possible defense under the doctrine of the last clear chance, by demanding an action of the engineer that would have been impossible confessedly under the instructions upon the conditions assumed."

The court modified the following instruction tendered by the defendants: "This doctrine of the last clear chance may be stated as follows: The general rule that where one, who through his own fault puts himself in a place of danger on a railroad track, is precluded from recovering damages for his resultant injury or death, is subject to the qualifications that where the engineer has discovered the peril of the deceased or his position, and it is apparent that he cannot escape, or he, for any reason, does not make an effort to do so, it becomes the duty of the engineer to use all means in his power to avoid injuring the person," by inserting, after the word "has" the following: "or by the exercise of ordinary care should have discovered."

The court refused to give the following instruction offered by the defendants: "No. 8. I instruct you that in considering whether engineer Frost acted with wanton and reckless negligence after discovering the peril of the deceased, in not avoiding striking him, you must take the situation and condition then existing, just as it was, not as you think it ought to have been. In other words, in the matter of speed, you cannot say that engineer Frost wantonly and recklessly ran down the deceased because you may be of opinion that if his train had been run at a different and lesser speed, whether within the ordinance requirements or otherwise, it would have been possible to have avoided striking him. This would be holding the defendant responsible for a previous act of negligence in the matter of speed; but the essential feature of the doctrine of last clear chance is that the conduct of the person whose action is the subject of inquiry must be tested by what he might have done under the conditions, as to speed and otherwise, as they actually then existed. So that your inquiry will be, with the speed of the train as it was, could engineer Frost, after discovering the peril of the deceased, and that deceased was unaware of his danger, and did not intend to withdraw to a place of safety, with such appliances as he then had, in the condition in which they were, have stopped the train in time to have avoided striking the deceased, and was his failure to do so, if you find there was such:

a failure, the result of recklessness and wanton indifference to human life, or merely the result of the exercise of bad judgment under the conditions then existing?"

It is contended that Neary was not entitled to have an active lookout kept for his presence upon the tracks, because he is to be regarded as a bare licensee (citing *Egan v. Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831.) It is alleged in the complaint that the employees of the Chicago, Burlington & Quincy Railway Company used the tracks and switches of the Northern Pacific Railway Company in making up trains and in operating the same, by permission of, and agreement with, the defendant company, and that the company and its employees had full knowledge and notice of this fact. Defendants maintain that there is no proof of this allegation. To this we cannot agree. There is testimony in the record to show that for eight or more months prior to the death of Neary, Chicago, Burlington & Quincy trains had been running into the Billings yards of the Northern Pacific; that these trains would "go any place in the yards west of the depot"; Chicago, Burlington & Quincy trains and crews used the Northern Pacific tracks as far as Huntley, about twelve or fourteen miles east; they would use any of the yard tracks that happened to be open, always, however, using tracks to the right (north) of the main track, taking "as much room" as they needed to make up the trains; the yard switch crew would break up Chicago, Burlington & Quincy trains, and, in making up such trains, any track was used which happened to be clear; in running into the yards these crews were directed by the yardmaster where to go; train No. 6, through the operation of which Neary was killed, ran out of Billings east, as Chicago, Burlington & Quincy No. 42, on a regular schedule; Chicago, Burlington & Quincy conductors, including Neary, were furnished with a copy of that schedule or time card; Northern Pacific cars ran over the Chicago, Burlington & Quincy to Kansas City as a part of the Chicago, Burlington & Quincy trains; the Chicago, Burlington & Quincy train crews used the Northern Pacific book of rules while on the Northern Pacific tracks;

Chicago, Burlington & Quincy employees were obliged to pass an examination on the Northern Pacific book of rules; Northern Pacific car inspectors inspected Burlington freight trains in the Northern Pacific yards. We think this testimony furnishes ample indirect evidence to substantiate the allegation of the complaint. If we are correct in this, the case probably falls within the rule laid down in *Riley v. Northern Pacific Ry. Co.*, 36 Mont. 545, 93 Pac. 948. The writer of this opinion is not in sympathy with the rule laid down in the *Egan Case*, *supra*, as applied to the facts in that case. But let us proceed to a consideration of the instructions in the light of the facts of this particular case.

With regard to instruction No. 7 it may be said that it is almost a literal copy of the language used by this court in deciding the former appeal, and is, therefore, right or wrong, the law of the case. But, it is argued, the court was merely announcing a general doctrine, and is not, therefore, foreclosed of the opportunity of now deciding that, in this particular case, the trial court was in error in supplementing the rule of the last clear chance, with the so-called "discovery doctrine." It is contended that the question is still an open one in this jurisdiction, and that the logical rule, and the one sustained by the great weight of authority, is that the doctrine of the last clear chance of averting the accident, in a case like the one under consideration, should be limited to the possibility of so doing after actual discovery, as distinguished from possibility of discovery. If in this statement the learned counsel for the appellants refer to the actual discovery of the presence of the person who is killed or injured, and that in a place where no duty rested upon the defendants to look out for him, the question must still remain an open one, because it is not presented by this record. Each of the instructions criticised refers to the possibility of discovering, by the exercise of reasonable care, the peril of the deceased, not alone his presence upon the track. His presence was discovered when the engine was 900 feet way. Instruction No. 8, wherein the court applied the abstract principles laid down in

No. 7 to the facts of this particular case, is distinctly predicated upon an initial finding by the jury that Frost saw the deceased upon the track, and also saw that he was not making any effort to leave it after being warned. Frost himself testified that when he crossed the western line of the Billings yards, he was going at the rate of from forty-five to fifty miles per hour. Some time after entering the yards, and about 1,900 feet west of where Neary was struck, he made a service application of air of about five pounds pressure. There is a public road crossing 7,040 feet west of the depot. At this point Frost sounded the usual crossing whistle. He said: "This [service] application was continued just after giving the first road-crossing whistle, when I was giving the second whistle for the man to get off the track, and repeated the whistle to find out whether he heeded the whistle or not, or heard the whistle. Had traveled with this five pounds application possibly a thousand feet and got within 900 feet of where he was, I should judge. Just about saw him for the first time when I got within 900 feet of him. I then gave two long and two short blasts or whistles, applied the air at the same time, the full service application of about fifteen pounds. There hadn't been any releasing at all of the five-pound application. The full application continued until I saw the man leave the track from within the rails and walk to the right. I then made a full-service release. In going this distance of a thousand feet with the five-pound application, the speed was reduced ten or twelve miles an hour, say about thirty-two or thirty-three miles an hour. I was within 400 feet of him when I made the release of the air. Then ran without any application of the air at all, before I applied the emergency, possibly 175 feet. I released the air because I saw him step outside the track. I was not in doubt from his movements as to whether he had heard me at all or not. I supposed he would get out of the way or was out of the way. From what I could see I thought he was at least three or four feet from the outside of the track. I had noticed he was taking check of his train. Afterward he stepped a little to the left.

He was walking all the time. Didn't appear to stop any more than to take a number and go on. I saw him up to the time I struck him. He was outside of the rail when I struck him. I ran, after applying the emergency, I should judge, 225 feet, before I struck him. At the time I struck him was running about twenty-five miles an hour. At the coroner's inquest I testified: 'When I first saw the man he was walking to the middle of the track, and just before I hit him, he stepped off to the right toward the outside of the track, and I looked for him to go off the track and as I approached nearer, I saw that he just stepped that way, simply because it happened to be that way.' "

J. H. Manley, a witness to the accident, testified: "I should judge the train ran about 150 yards beyond where the man was struck. He was standing just about on to the right—over the south rail."

C. C. Bever, a passenger on the train, testified that he felt no sudden jar in the stopping of the train.

There was testimony to show that a passenger train going at the rate of twenty-five or thirty miles per hour could, with an emergency application of air, be stopped in from 250 to 300 feet, and going at the rate of six miles per hour, it could be stopped in from two to fifteen feet. There was also testimony to show that the jar caused by an emergency stop would be felt by the passengers in the train.

Barrell, the fireman, testified: "Frost released the air after Neary had stepped to the outside of the rails. After hearing this whistle or after making this whistle, and then as he saw he didn't get in the clear—he whistled a succession of short whistles and held his engine in the emergency."

Gintz, one of the brakemen on Neary's train, testified that he was in the caboose when No. 6 passed; when the engine passed, the whistle was sounded in an unusual way—like a roar going by. The caboose was about 600 feet west of where Neary was struck. There were nine cars in the passenger train. The body lay opposite one of the Pullman sleepers which was either the eighth or ninth car from the engine. The length of these cars

and the engine was such that the engine must have passed the spot where deceased was struck, at least 150 yards before it was brought to a standstill.

Defendants' witnesses testified that Neary paid no attention to the approach of No. 6. He would take check of a car and then pass along to the next, walking between the rails of the main line in an irregular manner, apparently absorbed in his work. One of the car-repairers in the yard noticed the effect of the application of the emergency brake by Frost. The alarm whistle sounded by the engineer was heard and recognized as such by citizens a block or more from the railway yards. Frost also testified at the coroner's inquest: "From the time I first saw the man I would not dynamite the train the first time I saw him. You would think to whistle, giving alarm signals he would get off the track, and if you dynamite the train every time you saw anyone on the track or everything you saw on the road, you would be pretty slow on the trip."

In view of all of this testimony, the jury might have been justified in finding that Frost used ordinary care to determine whether or not Neary was in peril, and that he employed every reasonable effort to stop after he discovered his perilous situation. He says he apparently heeded the signals by stepping off to the south, but did not go far enough to become "in the clear." As was said in the former opinion in this case, no duty rests upon an engineer to stop his train whenever he sees a person upon the track, regardless of the distance away at which such person may be. He has the right to presume in the first instance that such person will heed the usual warning signals and take a place of safety. But whether, in view of all the facts and circumstances disclosed by the evidence, Frost was justified in acting upon this presumption to the extent that he did, was essentially a question of fact for the jury; and those instructions which imposed upon him the duty of using reasonable care to discover Neary's peril were, we think, in the circumstances of this case, appropriate and proper. Frost saw the necessity of sounding alarm signals when he was 600 feet from

the place of collision, and although he could have stopped his train in a distance of 300 feet, he in fact ran over 450 feet after the moment when, according to his testimony, he made the emergency application of his breaking apparatus.

The supreme court of Colorado, in *Nichols v. Chicago, B. & Q. R. Co.*, 44 Colo. 501, 515, 98 Pac. 808, 814 said: "Ordinarily, an engineer may presume that one approaching a public crossing over which a train is about to pass is aware of the approaching train, or will not place himself in a position of imminent peril; but he is not justified in relying upon this presumption if the circumstances are such that, as a reasonably prudent person, it should occur to him that the pedestrian is not aware that a train is approaching the crossing over which he is about to pass. An engineer guilty of negligence cannot blindly assume that a traveler approaching a crossing will not be. Ordinary care on the part of an engineer requires vigilance to guard against a dangerous situation reasonably to be apprehended as well as one actually imminent."

The jury would have been justified, we think, in concluding that Neary's absorption in his duties and his total failure to heed the approach of the train, with all danger signals sounding, was so apparent as to throw discredit upon the engineer's story of his own situation and actions at the time, and to lead to the conclusion that he exercised no care at all until a moment when no effort on his part could avert the accident.

Again, it is urged that because the complaint alleges that the engineer saw Neary when the train entered the yards and was aware that he was unconscious of its approach and knew of the danger he was in "a long distance before reaching him," a theory of the case was thus developed by the pleader which could not thereafter be departed from by claiming at the trial that, in the exercise of reasonable care, the perilous position of the deceased should have been discovered. Considering Frost's testimony as to how the situation presented itself to him, and all the other facts and circumstances in the case, we think the variance, if any, between the allegations of the complaint and the

theory upon which recovery was eventually sought, was immaterial.

5. Regarding those instructions wherein the jury were told that they might take into consideration the fact that the train was running at a rate of speed in excess of that prescribed by the city ordinance. It is contended that this excess speed was prior or primary negligence on the part of the defendants, which was offset or nullified by Neary's contributory negligence, and as the same speed was maintained up to the time of the collision, it was not an element to be considered by the jury in arriving at a verdict. There is no question, under the testimony, that the usual signals of the approach of the train were given by whistle. Whether the bell was ringing may be a matter of doubt, but, if it had been, it would probably have added nothing to the vociferous whistle alarm. The primary negligence of the defendants must have been in the excessive rate of speed; otherwise the negligence of Neary would not have been contributory. That it was contributory is settled by the law of the case. Three times, in the former opinion, this court spoke of the excessive speed of the train. The last reference is as follows: "We do wish to be understood, however, as holding that the defendants were guilty of gross negligence in running the train as they did, in violation of the ordinance; and that, taking into consideration this fact, together with the other facts admitted to be established by the evidence, it was not the province of the court to determine as a matter of law whether the defendants by the exercise of reasonable care could have stopped it and saved the deceased's life. This phase of the case should have been submitted to the jury under proper instructions." We do not see how the trial court, in the light of this language, could have refused to submit the matter for the jury's consideration, upon proper request being made. The direction therein contained established the law of the case. But we are not content to rest our conclusion upon this consideration alone. It is impossible to disabuse one's mind of the idea that the excessive rate of speed at which the train was

being propelled, after the engineer decided that extraordinary danger signals were necessary, was a proximate cause, if not *the* proximate cause, of his failure to avoid killing the deceased. To hold him excused for running at this high and dangerous rate of speed, after he discovered that Neary had placed himself in the most exposed position which could be selected, on account of the fact that he was violating the city ordinance and the rules of the company before he discovered the situation of the deceased, would seem like allowing him to take advantage of his own wrong. According to some of the witnesses, if the engineer had been observing the ordinance he could have stopped instantly. They all agree that he could have stopped within a few feet. We know that the momentum of the train and the force of the impact against Neary's body would, under such circumstances, have been comparatively insignificant. Probably he would have been but slightly injured, if injured at all, had the train been under full control as prescribed by the rules of the defendant company.

Counsel for appellants have called the case of *Sullivan v. Missouri Pac. Ry. Co.*, 117 Mo. 214, 23 S. W. 149, to our attention on this point. In that case the jury were instructed as follows: "And in this regard the court further instructs you that although you believe from the evidence that Ellen Sullivan was guilty of negligence in stepping upon the track, and although you may believe from the evidence that the servants, agents and employees of defendant in charge of said train, after seeing her on the track, and discovering the danger of her position, if it was dangerous, could not have avoided injuring her by the use of ordinary care; yet if you further find and believe from the evidence that their inability to avoid such injury after discovering her condition was caused by their running at an illegal rate of speed, and if they had then and there been running at a legal rate of speed they could have avoided injuring her by the use of ordinary care, then such negligence of said Ellen Sullivan is no defense to this action." The supreme court of Missouri said: "The first time the doctrine contained in this

qualifying clause came before this court in such a tangible shape as to warrant a ruling upon it was in the case of *Guenther v. Railway Co.*, 95 Mo. 286, 8 S. W. 371, in which it was disapproved. The next was in *Kellny v. Railway Co.*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783, and the last in *Dlauhi v. Railway Co.*, 105 Mo. 645, 16 S. W. 281, in both of which it was also disapproved. The reasoning in these cases shows that to adopt it would be, in this class of cases, to practically abrogate the doctrine of contributory negligence; for, while the principle which lay at the root of the accepted doctrine was that, although the plaintiff was guilty of negligence, contributing with that of the defendant to the production of the injury, yet if the defendant could, by the exercise of due care, after the situation became or might have become apparent to him, have prevented the injury, he was held responsible. The principle of this new doctrine is that he is to be responsible, whether he could have prevented the injury or not, after the situation became or might have become apparent to him. In applying this new doctrine to the acts of negligence, provided they further found facts in this case, the jury may well have concluded from this instruction that, although they might find that the deceased was guilty of gross negligence in entering upon the track in front of the approaching train, yet, if they further found that if the train was being run at a greater rate of speed than six miles an hour, they ought to find for the plaintiff, though the death of his mother was the result of these two concurring acts of negligence, provided they further found the fact to be that she went upon the track at any distance from the train within which it could have been stopped before it struck her, if the train had been going at no greater rate of speed than six miles an hour. Thus, the power to prevent the injury is practically eliminated by the instruction from the law of contributory negligence as a basis of recovery; and the right to recover is predicated upon concurrent negligence of both parties, and the finding of a fact tending only to prove that the deceased was not negligent. It is to be regretted that in so close a case as this,

otherwise so well tried, an error such as this should have been committed; but the error being of such character as that it may have affected the result, the judgment must be reversed, and the cause remanded for a new trial."

At first impression the rule laid down in the foregoing opinion appears to be logical; but after mature consideration we have arrived at the conclusion that it is not founded upon correct reasoning; and it is certainly not a humane rule. Several of the judges dissented vigorously from the conclusion reached in the *Sullivan Case* on the question we are considering. The contributory negligence of a plaintiff or deceased person which will operate to defeat a recovery must be such as directly contributes to the injury at the time it is inflicted; his negligence must be a proximate cause of his injury. Running a train in a city in excess of the rate of speed fixed by ordinance is negligence *per se*; and if this lapse of duty directly contributes to an injury the person responsible therefor is liable in damages. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Osterholm v. Boston & Mont. C. C. & S. Min. Co.*, 40 Mont. 508, 107 Pac. 499, 505.) How, then, can it be said that the excessive rate of speed after Neary's peril was discovered was but a continuance of that primary negligence which obtained before such discovery? It existed as an active agency up to the very moment of collision, and may be said to have been a new and different act of negligence. It contributed directly to his death. Indeed, had it not been for the fact that the ordinance was being violated, the death of Neary, viewing the attendant circumstances from Frost's standpoint, could have been avoided, in all probability. If the excessive rate of speed before discovery constitutes negligence *per se*, and circumstances intervene, to-wit, discovery of position or peril, which make it incumbent upon an engineer to use every reasonable effort to avoid striking a man upon the track, and he is unable to stop solely on account of the excessive speed which was maintained, not only before, but after discovery, we are satisfied that the fact that the ordinance was being violated is *per se* evidence

of negligence after discovery, as well as at any other time to which inquiry may properly be directed; and that the only defense under the circumstances, assuming the excessive and illegal rate of speed to be admitted or proven, is that such violation of the ordinance was not the proximate cause of the accident. In this case, Neary's negligence contributory to the primary fault of Frost was not the proximate cause of his death. It was a mere condition existing prior to the accident. The proximate cause was the fact that Frost was unable to stop his train because of the further fact that he was violating the city ordinance and the rules of the company after Neary's peril was discovered by him. We have no hesitancy in saying that if a railway engineer approaches the yards of his company at Billings, or any other city where a similar ordinance is in force, at a rate of speed exceeding six miles per hour and observes a person in the yards upon the track over which he is about to pass, the duty of reducing his speed to the ordinance limit arises instantly upon entering the city limits, and that the engineer, under such circumstances, may not rely upon the usual presumption that the person will, upon signal, assume a place of safety.

6. It is contended that the verdict is so large that, in view of the testimony, it evidences passion and prejudice in the minds of the jury and a new trial should have been granted for that reason. The verdict is very large. However, there is substantial evidence to warrant it. W. P. Matheson, a life insurance agent, testified that according to standard mortality tables, Neary's expectancy of life was about twenty-nine years, and that an annuity of \$100 per year would have cost him about \$1,800; that the insurance companies, or compilers of the annuity tables, base their calculations on the earning power of money at three per cent per annum. He also said: "I know of farm loan mortgages being made in this neighborhood at rates of interest of seven to ten per cent, an average of eight per cent, without taxes to nonresidents. I have never known of any loss around here on such security. The charge made for annuities is large enough to pay the proportionate share of running ex-

penses and the profit of the company. The only advantage of an annuity over an investment in farm loans would be the increased security." Mrs. Neary testified that her husband's wages averaged \$150 per month the year around. The amount of his personal expenses does not appear, but we may adopt the suggestion of counsel for both sides, that \$50 per month would be a fair allowance.

The court instructed the jury that in considering the annuity tables, in determining the amount of damages to be awarded, they should take into consideration the maximum safe earning power of money in the community. They may have determined this to be three per cent. Under the evidence they were warranted in so doing. At this rate an annuity yielding \$1,200 per annum would cost \$21,600, or \$3,400 less than the amount of the verdict. The testimony shows that Neary was an excellent husband and father, a man of some education, given to reading and study, and capable of instructing his children. He spent his evenings at home, was strong, healthy, industrious, and of a happy and agreeable disposition. We cannot say that \$3,400, or twice that amount, would be an excessive allowance for loss of his society, companionship, care, and protection. In the nature of things, jurors must be left to judge such matters for themselves. We repeat that this verdict is very large—larger perhaps than any verdict which has ever been rendered in the courts of this state under similar circumstances; but in so far as it comprehends loss of that portion of earnings which would probably have been contributed to the support and maintenance of the plaintiffs, the great part of it is capable of being arrived at by mathematical calculation under the testimony. No argument is advanced in criticism of the instructions. This court in *Yergy v. Helena L. & Ry. Co.*, 39 Mont. 213, 242, 102 Pac. 310, 320, said: "The elements of passion and prejudice will not be presumed to have influenced the minds of jurors who return a verdict, based on competent testimony, in accordance with instructions, and easily to be arrived at by mathematical calculation." The fact that the jury selected as the basis of

their verdict the evidence which would result in a large award of damages cannot be said to evince passion or prejudice on their part. Their power of judging of the effect of evidence necessarily involved a right to act upon any competent evidence.

7. Appellants objected to certain items of costs and disbursements for mileage and *per diem* included in respondent's memorandum of costs as filed in the district court and moved to retax the same. We will take the case of the witness Gintz as a sample of the items to which objections were filed. The memorandum reads: "L. Gintz, from state line and return, first and second trials, 460 miles, \$46.00." The ground of objection is thus stated in the brief: "The chief point of our objection is that, as the statutes (sections 3182 and 7169, Revised Codes) contemplate that a witness shall be allowed the mileage necessarily traveled by the shortest traveled route in coming from the place of his residence to the place of trial, and returning from the place of trial to his residence, it is necessary, when such mileage is claimed, that the cost memorandum should advise the party against whom it is sought to charge the mileage, as to where the place of residence of the witness is, to the end that it may be determined therefrom whether that is in fact his residence, and whether the mileage claimed is actually the mileage by the shortest traveled route between the two places; and the memorandum should further state that this number of miles was necessarily traveled." The cases of *Cole v. Ducheneau*, 13 Utah, 42, 44 Pac. 92, *Garr v. Cranney*, 25 Utah, 193, 70 Pac. 853, and *Merriman v. Bowen*, 35 Minn. 297, 28 N. W. 821, are cited to support the argument. To relieve the controversy of the question of indefiniteness as to dates of attendance of witnesses and mileage necessarily traveled, an amended memorandum was prepared, accompanied by a motion for leave to file the same. Service of the amended memorandum and of the motion for leave to file was made upon the appellants. The court refused to allow the amended memorandum to be filed and overruled the objections to the original memorandum. We think the motion for leave to file the amended memorandum should have been

granted. The taxation of costs is such a "proceeding" as is referred to in section 6589, Revised Codes, giving the court authority to allow an amendment thereto "in other particulars." No new items were sought to be added to the original bill. The plaintiffs simply furnished therein the particular information, the absence of which from the original memorandum was alleged by the defendants to be prejudicial to their rights. The supreme court of Utah has made a similar ruling (*Dignan v. Nelson*, 26 Utah, 186, 72 Pac. 936), as has also the supreme court of California, in *Burnham v. Hays*, 3 Cal. 115, 58 Am. Dec. 389. We think the holding is in accordance with the spirit of our statute relating to amendments and the intention of the legislature in enacting the same. Neither is it necessary to make a showing of inadvertence, surprise, or excusable neglect in order to warrant the court in allowing such an amendment.

It is contended by the appellants that for this court to now consider the amended memorandum would deprive them of a right to attack the items of mileage by a countershowing after they had been properly identified; while on the part of the respondents it is contended that if we should now sustain the appellants' objections to the original memorandum, their right of appeal from the order refusing to allow the amendment is lost to them, inasmuch as they had a ruling in their favor as to the sufficiency of the original memorandum, and could, therefore, not appeal. But we do not attach importance to either of these considerations in the circumstances. Our judgment is that the district court abused its discretion in refusing leave to file the amended memorandum. Upon the motion for leave to file being made, the court should have granted it despite objection. The appellants might then have met the same in any manner that seemed advisable. We think it our duty to consider it as filed, and to overrule the objections to the items of costs and disbursements, for that reason.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

KIPP ET AL., RESPONDENTS, v. DAVIS-DALY COPPER CO.,
APPELLANT.

(No. 2,871.)

(Submitted June 27, 1910. Decided July 6, 1910.)

[110 Pac. 237.]

*Cities and Towns—Use of Streets—Rights of Abutting Owners—
Powers of Council—Street Railroads for Carriage of Freight—
Public Use—Mining—Injunction—Pleading—Conclusions.*

Cities and Towns—Use of Streets—Extent of Powers of Council.

1. The municipal authorities which have control of streets and highways may use or permit the use of them in any manner or for any purpose reasonably incident to the appropriation of them to public travel, not only in view of the necessities and requirements of the public as they existed at the time the highway was created, but also in view of the constantly changing modes of travel and transportation brought about by the increase of population and expansion in the volume of traffic. For such changing public uses the owner of abutting property is presumed to have received compensation when the way was created.

Same—Use of Streets—Rights of Abutting Owners.

2. If a particular use of streets to which consent has been given by the municipal authorities is in the nature of a public use, and is not more burdensome than other public uses which may have been within possible contemplation at the time the way was created, it is not a taking or damaging of property of abutting owners within the constitutional provision that just compensation must first be made.

Same—Street Railroads—Hauling Freight—Mining—Public Use.

3. *Held*, that the use to which a railroad proposed to be constructed in the streets of a city by a mining company was to be put in hauling supplies, ores, etc., to and from the company's mine, as well as supplies, ores, merchandise, etc., which might be offered for carriage by any person or corporation, was a public use.

Same—Street Railroads—Additional Servitude—Rights of Abutting Owners.

4. *Held*, that a railroad proposed to be constructed by a mining company over the streets and entirely within the limits of a city, for the carriage of supplies, ores, etc., which would otherwise have to be conveyed by teams, is not a "commercial" railroad as distinguished from street railroads; that such contemplated use of the city's streets falls within their ordinary uses; and that, therefore, no additional servitude is cast upon the owner of abutting real property for which compensation must first be made.

Injunction—Pleading—Conclusions.

5. The bare statement in a complaint asking for an injunction to restrain a mining corporation from constructing a railroad upon and along the streets of a city under an ordinance granting it the right

to do so, that said ordinance was unreasonable, was a mere conclusion, and insufficient to warrant any relief on the ground that the council abused its discretion in enacting it.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Louis Kipp and others against the Davis-Daly Copper Company. From an order granting plaintiffs an injunction, defendant appeals. Reversed.

Mr. Chas. R. Leonard, Mr. M. S. Gunn, and Messrs. Lamb & Walker, submitted a brief in behalf of Appellant. *Mr. Gunn* argued the cause orally.

Whether or not the construction, maintenance and operation of the street railroad in question is within the purposes for which a street may be lawfully used is, it seems to us, answered by certain provisions of the Constitution and statutory law of the state. (See Const., Art. XV, secs. 5, 12; Rev. Codes, subd. 6, sec. 3259.) In view of these provisions, the power of the city of Butte to grant the right of way through the streets for the construction, maintenance and operation of the railroad described in the ordinance is not open to question. This being true, does it not follow that the use of the streets for the construction, maintenance and operation of such a railroad was contemplated, or should be presumed to have been contemplated, when the streets were dedicated? If so, the abutting proprietors cannot complain. (See *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339; *Arbenz v. Wheeling & Harrisburg R. R. Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Morris & Essex R. R. Co. v. City of Newark*, 10 N. J. Eq. 352.)

Whether or not the respondents are entitled to compensation is a question of law. (Lewis on Eminent Domain, 3d ed., sec. 168; *Williams v. Brooklyn R. R. Co.*, 126 N. Y. 96, 26 N. E. 1048; *Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102, 29 Pac. 883.)

Mr. C. M. Parr, and *Messrs. Kremer, Sanders & Kremer*, submitted a brief in behalf of Respondents. *Mr. Parr* argued the cause orally.

All modern authority does draw a clear and emphatic distinction between a street railroad for carriage of passengers and one for the carriage of freight. So-called commercial railroads in cities which transport freight are held to impose an additional servitude as against abutting property owners, and we fail to see any distinction between carrying freight to a mine and carrying whisky or other commodities to any part of the city. (See *Lewis on Eminent Domain*, sec. 164.)

Appellant cites the case of *Montgomery v. Santa Ana & W. R. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654. The California court in that case was at a loss to see the distinction between a street railway for the carriage of passengers and a street railway for the carriage of freight or freight and passengers. It followed the Missouri decisions, which up to the case of *Sherlock v. Kansas City etc. R. R. Co.*, 142 Mo. 172, 64 Am. St. Rep. 551, 43 S. W. 629, had held the same way. But in the case of *Smith v. Southern Pac. R. Co.*, 146 Cal. 164, 106 Am. St. Rep. 17, 79 Pac. 868, the court repudiated this doctrine, and held that the building of a railroad on a narrow street causes damage to the abutting property owner.

Subject to the property rights and easements of abutting owners, the legislature "has full and paramount authority over all public ways and public places." (*Dooley Block v. Salt Lake R. T. Co.*, 9 Utah, 31, 33 Pac. 233, 24 L. R. A. 610.) These easements are property protected by the Constitution from being taken or damaged without compensation. (*Root v. Butte A. & P. Ry.*, 20 Mont. 354, 51 Pac. 155; *Less v. City of Butte*, 28 Mont. 27, 98 Am. St. Rep. 545, 72 Pac. 140, 61 L. R. A. 601; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *Eachus v. Los Angeles Ry.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Regney v. City of Chicago*, 102 Ill. 64; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313, 18 L. R. A. 161; *Lewis v. City of Seattle*, 5 Wash. 741, 32 Pac. 794; *Hickman v. City of Kansas*,

120 Mo. 110, 41 Am. St. Rep. 684, 25 S. W. 225, 23 L. R. A. 658; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537, 22 S. W. 1059; *Schaller v. Omaha*, 23 Neb. 325, 36 N. W. 533.)

“Public use” is synonymous with public benefit, or advantage. (*Olmstead v. Camp*, 33 Conn. 550, 89 Am. Dec. 221.) The taking of land by eminent domain act is for public use only. (*East St. Louis v. St. John*, 47 Ill. 466.) Statutes authorizing the exercise of eminent domain are subject to strict construction. (*Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 281; *Embury v. Connor*, 3 N. Y. 511, 53 Am. Dec. 325.)

Damage to property is placed in the same category as the value of property taken, and neither can be done without compensation first made. (*Werth v. Springfield*, 78 Mo. 107; *Rear-den v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109, 6 Pac. 317; *Blanchard v. Kansas*, 16 Fed. 444, 4 McCrary, 217; *Hamon v. Omaha*, 17 Neb. 548, 52 Am. St. Rep. 420, 23 N. W. 503; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Chambers v. C. & G. R. Co.*, 69 Ga. 320; *McElroy v. Kansas City*, 21 Fed. 257; *New Brighton v. N. S. P. Church*, 96 Pa. 331; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313, 18 L. R. A. 161.)

An injunction will be granted where the street is narrow, and the railway will practically destroy it as a thoroughfare and deprive abutters of access to their property. (*Commonwealth v. Frankfort*, 92 Ky. 149, 17 S. W. 287; *Chicago etc. R. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759; *Hendree v. Toronto etc. R. R. Co.*, 26 Ont. 667; *Hepting v. New Orleans etc. R. R. Co.*, 36 La. Ann. 898; *Pepper v. Union Ry. Co.*, 113 Tenn. 53, 85 S. W. 864.) Injunction will lie where the line is a private railroad for private use. (*Glaessner v. Anheuser-Busch Brewery Assn.*, 100 Mo. 508, 13 S. W. 707, and cases cited in 2 Lewis' Eminent Domain, 3d ed., note 58, p. 1582.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain an injunction to restrain the defendant corporation from constructing and operating a

line of railroad upon and along Ohio and Mercury streets, in King's addition to the city of Butte. Mercury street is one of the principal thoroughfares of the city, extending through it from east to west. Throughout the portion in controversy here it is fifty feet in width. The plaintiffs own lots abutting thereon on both sides, with a frontage in the aggregate of 1,000 feet. The defendant is a mining corporation, organized under the laws of the state of Maine, owning mines within the limits of the city and having its principal business in the city. On February 16, 1910, the city council, upon petition of defendant, enacted an ordinance granting to it the privilege of laying a line of railroad, with the necessary tracks, along Ohio street from its operating shaft upon the Colorado claim, 360 feet south to the intersection of Ohio and Mercury streets; thence 675 feet east along Mercury street, to a point beyond plaintiffs' property opposite other mining property belonging to the defendant; thence south through the latter to connect with a spur track of the Northern Pacific Railway Company, within the limits of the city. The ground for asking the privilege, as stated in defendant's petition to the council, was that it was engaged in operating and developing the Colorado mine; that a large quantity of ore and rock was being extracted daily; that it was possessed of no means by which this material could be conveyed away and supplies be delivered to the mine, except teams; and that it desired the privilege in order that it might readily effect the necessary transportation and secure connection with the spur track of the Northern Pacific Railway Company. The ordinance requires the tracks to be not wider than four feet between the rails, to be laid upon, and conform to, the grade of the street, and to be planked between the rails and on the outside thereof to the extent of one foot, under the supervision of the city authorities, so as to obstruct or impede travel over the streets as little as possible. It prescribes the character of cars which may be used, limiting the number to be run at any one time to three, and the maximum rate of speed for their movement; permits the use of any motive power other than steam by

direct application, reserves in favor of pedestrians and vehicles the right of way at crossings and in passing over the street, and declares with much particularity numerous requirements which must be observed by the defendant. It further provides that the track or tracks shall not remain on Ohio street longer than six months. At or before the expiration of that time the track or tracks must be removed to defendant's own property lying to the west of Ohio street and extending from the shafthouse south to Mercury street, a suitable connection to be made of this line with the line on the latter street. At the end of five years the use must be discontinued altogether, and the tracks removed. A condition of the grant is that the defendant shall carry "all ores, freight, coal, wood, timber, supplies, goods, wares and merchandise which shall be requested of the grantee herein by any person or corporation desiring to utilize the carrying facilities of said grantee, such carriage to be done in a reasonable manner and at reasonable times and for a reasonable consideration, * * * under the supervision and subject to the approval of the city council." The defendant is required to accept the grant in writing and to accompany its acceptance with a good and sufficient bond in the sum of \$5,000, to be approved by the city council and conditioned to save the city harmless in case it shall be held liable for damages to any person by reason of the construction and maintenance of the railroad or of any act of negligence or carelessness in the management or operation thereof by the defendant or its successors or assigns. Upon the failure of the defendant to observe any of the requirements enumerated, the privilege granted may, upon notice by the council and at its option, be declared forfeited.

In addition to the foregoing, the complaint alleges, in substance, that the plaintiffs have property rights in Mercury street, in front of their respective lots, subject only to the right of the public to use the same as a highway; that the defendant has not, by an attempt to exercise the right of eminent domain, sought to condemn the plaintiffs' rights or to acquire them by agreement or purchase; that unless it is restrained from doing

so, it will proceed to appropriate for its railroad and use a large part of them without compensation to plaintiffs; that it is a mining corporation and is engaged exclusively in mining; that the line of road which it proposes to build under the grant from the city is a private line, to be owned and operated by it for its own use and benefit, and not otherwise, for hauling ore, rock and other materials taken from the Colorado mine, and delivering thereat supplies for its own private use; that if the railroad is constructed and equipped as is proposed by the defendant, it will prevent the plaintiffs from having free access to, and free use and enjoyment of, their property, and, by imposing an additional burden upon the street, diminish the value of their property; that defendant is a private corporation and has no right to use or occupy the streets of the city, nor any right to build or maintain a railroad thereon for its own use or benefit; that the city has not the power to grant to it a right or license to use the streets, or any of them, for that purpose; that the railroad is not necessary for the convenience of the public, and that the ordinance granting the right to defendant to construct and maintain it is unreasonable, and therefore void. The prayer is for a perpetual injunction. Upon the filing of the complaint the court issued an order to show cause, and, after a hearing upon the complaint and oral evidence, entered an order directing an injunction to issue as prayed. The appeal is from this order.

The question presented for decision is stated by counsel for appellant in their brief as follows: "If the construction and operation of the street railroad described in the ordinance is within the purposes for which the streets were established, the respondents have no cause of action. Abutting owners may suffer inconvenience, and their property may be depreciated in value by the use of the street for certain purposes, but if such use is legitimate and one which was in contemplation, or is presumed to have been in contemplation, when the street was created, there is no legal cause for complaint. There is, then, but one question for consideration on this appeal, which may be stated as follows: Is the construction and operation of the street

railroad in question within the purposes for which the streets were dedicated?

Under the statute (Revised Codes, sec. 3259) a city or town council has exclusive control over the streets, avenues, alleys and sidewalks of the city or town, and the power to regulate the use of them, not only for purposes of travel thereon by pedestrians, but also by vehicles of every character for the purpose of pleasure or business traffic. Under subdivision 66 of this section, it also has the power "to grant a right of way through the streets, avenues and other property of a city or town for the purpose of street or other railroads and to regulate the running and management of the same, and to compel the owner of such street or other railroad to keep the street in repair when occupied by such street or other railroad; to regulate the speed of railroad engines, and to require railroad companies to station flagmen at street crossings." This provision carries out the plain intent of section 12 of Article XV of the Constitution, which declares: "No street or other railroad shall be constructed within any city or town without the consent of the local authorities having control of the street or highway proposed to be occupied by such street or other railroad." Under another provision of the Codes, the fee to the land covered by a street once established is vested in the public; for the form of dedication required of the owner, when the plat of the city or town or an addition thereto is recorded, is equivalent to a deed. (Revised Codes, sec. 3470; *Hershfield v. Rocky Mt. Tel. Co.*, 12 Mont. 102, 29 Pac. 883.) But it is not important to inquire where the fee is vested. The respective rights of the abutting owner and the public are dependent upon the fact of dedication. In view of these provisions as well as of the rule of law recognized everywhere, the authorities which control streets and highways may use or permit the use of them in any manner or for any purpose which is reasonably incident to the appropriation of them to public travel and to the ordinary uses of streets or highways under the different conditions which arise from time to time. (*White v. Blanchard Bros. Granite Co.*, 178 Mass. 363, 59 N. E. 1025.) For

a highway is created for the use of the public, not only in view of its necessities and requirements as they exist, but also in view of the constantly changing modes and conditions of travel and transportation, brought about by improved methods and required by the increase of population and the expansion in the volume of traffic due to the ever-increasing needs of society. Were this not so, any change in these respects would require a readjustment of rights as between the public and the abutting property owner, because the result of it would of necessity be held an imposition of a new burden upon the highway, and hence upon the property of the abutting owner. For these changing public uses the owner must be presumed to have received compensation when the highway was created. (*White v. Blanchard Bros. Granite Co.*, *supra*; *Montgomery v. Santa Ana W. Ry. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89, 37 Pac. 786, 25 L. R. A. 654; *Mordhurst v. Ft. Wayne etc. Traction Co.*, 163 Ind. 268, 106 Am. St. Rep. 222, 71 N. E. 642, 66 L. R. A. 105; *Taylor v. Portsmouth etc. St. Ry. Co.*, 91 Me. 193, 64 Am. St. Rep. 216, 39 Atl. 560; *Cater v. Northwestern Tel. Ex. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. 111, 28 L. R. A. 310; *Rafferty v. Central Traction Co.*, 147 Pa. 579, 30 Am. St. Rep. 763, 23 Atl. 884; *Doane v. Lake Street etc. R. R. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520, 36 L. R. A. 97; *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267, 36 Am. Rep. 542; *Julia Bldg. Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398; Elliott on Roads and Streets, 2d ed., sec. 407.) The rule was recognized by this court in *Hershfield v. Rocky Mt. Bell Tel. Co.*, *supra*, wherein it was held that the erection of telephone poles, to a reasonable extent, in the streets of a city is within the uses to which the streets may lawfully be put, when the use for this purpose has been sanctioned by the city authorities. This general rule is subject, however, to the limitation that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." Within this limitation, the power of the legislature is supreme, and while in delegating the power of control

to the municipality, it may impose such additional limitations as it chooses, yet if it does not impose any, the authorities of the municipality are free to act so long as the rights of the abutting owner are not invaded.

It is often difficult to determine whether a new use is such an invasion of the rights of an abutting owner as entitles him to damages within the meaning of the limitation. If it is, compensation must be made before the use is installed. But it must be borne in mind that the way was created for all uses to which it might reasonably be put in view of improved methods and the increasing needs of the public; and the limitation is to be given a construction which will not defeat this original purpose. And if the particular use to which consent has been given by the municipal authorities is in the nature of a public use, and is not more burdensome than other public uses which have been held to be within possible contemplation at the time the way was created, it is not a taking or damaging of the rights of the owner, within the purview of the limitation. (*White v. Blanchard Bros. Granite Co., supra.*)

That the purpose for which the defendant intends to build its railroad is in the nature of a public use must be admitted. Mining is a dominant industry in this state. In some localities it is the all-important industry. The prosperity of the state has been due, in large measure, to it, and many of our other industries and business enterprises are almost entirely dependent upon it. This is especially true in Butte and its immediate vicinity, because there the great mass of the people gain their livelihood from their employment in the mines and reduction of ores. There, as in many other localities in the state, the mineral deposits are the only available natural resources, and but for the promise which they give of profitable return for well-directed investment and industry, such portions of our state would be almost entirely destitute of population, whereas they now furnish homes and the means of support for populous communities. Hence, from the beginning, it has been the policy of the state, indicated by its constitutional and statute law, as interpreted by

this court, to foster and encourage the development of the state's mineral resources in every reasonable way. It has favored the industry of mining in the matter of the taxation of mining property (Const., Art. XII, sec. 3; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 44 Pac. 516, 32 L. R. A. 635; *Hale v. County of Jefferson*, 39 Mont. 137, 101 Pac. 973), and has included among the public uses for which private property may be taken by the exercise of the right of eminent domain, roads, tunnels, ditches, flumes, pipes and dumping places for working mines, mills, or smelters for the reduction of ores, etc. (Revised Codes, sec. 7331.) It has also declared that all railroads shall be public highways, and all railroad companies shall be public carriers (Const., Art. XV, sec. 5), and that all persons shall have equal right to have persons or property transported on and over any railroad (Const., Art. XV, sec. 7). In view of these express requirements, and the paramount importance of the mining industry, it has been held by this court that a railroad company may acquire, by the exercise of the right of eminent domain, right of way for its lateral lines extending to mines and smelters, though owned by private persons, as well as the right of crossing with them the main or lateral lines of other roads. (*Butte, A. & Pac. R. Co. v. Montana U. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298.) It may be that a natural person or a corporation other than a railroad corporation may not, for a right of way for a railroad, acquire the property of others by the exercise of the right of eminent domain, because the legislature has not so provided. Yet if such ownership is acquired, it must of necessity be subject to all the burdens imposed by the fundamental law. And this necessity was recognized by the city council, in including among the provisions of the ordinance granting the right in question, a requirement that the defendant shall carry all ores, supplies, etc., which other persons may require it to carry. And while the road may not be so situated or of such extent that its services may be in great demand, or demanded at all by the public, yet the "character of a way, whether it is public or private, is determined by the extent

of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small." (*Butte, A. & Pac. Ry. Co. v. Montana U. Ry. Co., supra.*)

Since, in view of the foregoing provisions, we must conclude that the use to which the city council has given its consent is a public use, it remains only to inquire whether the installation of the use in question will result in damage to the plaintiffs, within the meaning of the constitutional prohibition.

It is conceded by counsel for the defendant that the construction of a street passenger railway upon the surface of a street, and the operation of it by means of horse-power or a trolley system is a legitimate use of the street; that it imposes no additional burden upon the fee, and that the abutting owner, whether he owns the fee or not, is not entitled to compensation for damage resulting therefrom. This concession is properly made, because this view is sustained by the decisions of the courts generally. (1 Lewis on Eminent Domain, 3d ed., secs. 158, 161, and cases cited in notes; 3 Abbott's Municipal Corporations, sec. 844.) But it is said that the same rule does not apply to a commercial railroad, and that the one defendant proposes to build falls within this class. There is, however, a distinction everywhere recognized between what are termed commercial railroads and what are termed street railroads. The former are defined by Mr. Lewis as railroads employed in general freight and passenger traffic from one town to another, or between one place and another. The latter, he says, includes all such as are constructed in public streets for the purpose of conveying passengers, with hand luggage, from one point to another on the street. (1 Lewis on Eminent Domain, 3d ed., sec. 150.) We readily concede that a commercial railroad does not fall within the uses to which the streets of a city or town are presumed to have been dedicated. The servitudes to which they are subject, are: The right of transit by travelers on foot or in vehicles of any description; the right to transmit intelligence by letter, mes-

sages, or any other method suitable for this purpose, as by telegraph or telephone; the right to transmit water, gas or sewage for the use and benefit of the public, and the right to transport personal effects, such as goods, wares and merchandise, either by hand or by any conveyance suitable for that purpose. These rights are to be enjoyed by all in common, and every individual may employ such means of locomotion as may be employed by every other, and is not destructive of the means employed theretofore. As society advances and new inventions are made, different means of locomotion and conveyance may be employed. A vehicle propelled by steam or electricity, upon a fixed track constructed so as to conform to the surface of a street, is as legitimate as one drawn by horses. The installation of the structures and machinery necessary to the operation of a commercial railroad, massive and permanent as they must be, would be inconsistent with these rights, and in a large measure entirely destructive of them, by excluding from the street travel and traffic by ordinary modes. The railroad proposed here, however, does not fall within the definition of a commercial railroad. The question, then, may be stated thus: Is a railroad constructed along a street, within the limits of a city, exclusively within such limits and for the purpose of conveying freight which would otherwise be conveyed thereon by teams, within the ordinary uses of the street?

In New York, street railroads are authorized by statute to convey persons and property in cars for compensation. It is held by the courts of that state that this authorizes such railroads to operate cars designed and intended exclusively for carrying express matter, freight or property. (*De Grauw v. Long Island El. Ry. Co.*, 43 App. Div. 502, 60 N. Y. Supp. 163; s. c., 163 N. Y. 597, 57 N. E. 1108; *Matter of Stillwater & M. St. Ry. Co.*, 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489.) So in *White v. Blanchard Bros. Granite Co.*, *supra*, it was held that the construction of a horse railroad along a highway from a quarry to a steam railroad, to be used for the transportation of freight only, did not impose an additional burden upon the abutting

property. The ground for this conclusion was that the transportation of freight over the highway is one of its legitimate uses, and that it is not any more burdensome to transport it in cars moving upon a fixed track, than it would be to transport it by means of wagons drawn by horses.

In the case of *Mordhurst v. Ft. Wayne & S. W. Traction Co.*, *supra*, it was held that the operation of an interurban railroad by electric power, through a city street upon a track constructed of T rails, with authority to convey passengers, baggage, mail, and light express with a limited number of cars, did not impose an additional burden upon the abutting property. In discussing the question whether the carrying of the articles permitted by the charter of the railroad would have this effect, the court said: "The carriage of light express matter, passenger baggage, and mail matter upon street-cars would not constitute ground of complaint on the part of abutting lot owners. If only one car is run, the street is occupied and obstructed by it to no greater extent than it would be by a street car. If two constitute a train, they will take up no more space and do no more injury than a motor car and trailer, which are commonly run upon street railroad tracks when the business of the company requires such additional car. The fact that light express matter, passenger baggage, and United States mail matter are carried on a car does not affect the property owner, nor injure his property. The transportation of articles of this kind does not create any resemblance between the interurban electric railroad and a steam railroad carrying ordinary goods and merchandise, and results in none of the annoyances and injuries which are caused by either passenger or freight trains on such a railroad. * * * It is apparent that every objection founded upon injury to his property rights which the plaintiff can justly urge against the use by the defendant of Fulton street in front of plaintiff's lots would apply with equal force to the use of that thoroughfare by an electric street railroad constructed and operated wholly within the city limits. But this court has held that such a street railroad is not an additional burden upon the street, and that the owners of abutting real estate are not en-

titled to compensation on account of such appropriation and use." The same conclusion was reached by the same court, in *Kinsey v. Traction Co.*, 169 Ind. 563, 81 N. E. 922.

In *Montgomery v. Santa Ana W. R. Co.*, *supra*, it was said: "In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them by grade, width, and structure of roadbed to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned, so far as ease, speed, and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening the road or street, and therefore add nothing material to the burden of the servitude of the abutting land owner, while a precisely similar structure adapted to the transportation of freight adds an additional burden of a different character to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that when a public street in a city is dedicated to the general use of the public, it involves its use subject to municipal control and limitation, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a

user imposes no new burden or servitude upon the owner of the abutting land.”

It was held by the supreme court of Missouri, in *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. Ry. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706, 20 S. W. 658, 18 L. R. A. 339, that the construction and operation of a commercial steam railroad along a public street on the established grade, under the authority of the city, did not violate the rights of abutting owners, within the purview of the provision of the Constitution *supra*. We should not be inclined to go to the extent to which this court goes, because the use of a highway by a commercial railroad cannot, upon any just principle, be held to be within the ordinary uses of the highway. Yet the case is authority for the proposition that the inauguration of a new use, under proper authority, within the general purposes for which the highway was created, is not a taking or damaging of the property of the abutting owner.

After discussing the cases upon the subject, Mr. Lewis makes the following observations: “It would seem to follow that the operation of express cars on the street railway tracks was a legitimate use of the street. The use of street-cars for the transportation of freight has but just begun. Whether the practice is likely to increase and become general remains to be seen. When we direct our attention to the moving freight-car, taking the place of twenty drays, twenty pairs of horses and twenty drivers, the advantages of such a use of the streets seem obvious. It is presumably more economical. It saves wear and tear of the street, diminishes the accumulation of dirt and filth, relieves congestion, and diminishes the noise and confusion. The movement of the freight-car would no more interfere with abutting property than the movement of the passenger-car. To the extent that the freight-car is a substitute for traffic teams on the street it thus tends to make the street quieter, cleaner, freer, and more sanitary. And since the street exists as much for the movement of freight as for the movement of persons, there seems to be no reason why the street freight-car should not be put upon the same basis as the street passenger-car, in

so far as concerns the mere movement of the car on the tracks and in so far as it carries freight which would otherwise be carried in vehicles on the streets.’’

On principle, the rights of the abutting owner bear exactly the same relation to the inconveniences which are incident to the tracks installed for the movement of passenger-cars and the movement of cars thereon, as they do to the inconveniences which arise from the conveyance of freight by the same means. It can make no difference to him what the cars are loaded with; and if the city authorities so control their construction and movement as not to obstruct access to his property, more than it would be obstructed by the movement of passenger-cars, he has no cause for complaint on the ground that his constitutional rights are invaded.

While it may be inconvenient or impracticable for freight-cars to make frequent stops to receive and discharge freight, because this would cause a substantial interruption of ordinary street traffic, this consideration furnishes no objection to the movement of cars loaded with freight between designated points along a street upon which the same freight must be conveyed in drays or other similar vehicles. It may be, also, that in a given case a street may be so narrow that to permit the laying of tracks therein for any purpose would so far obstruct access to the property abutting thereon as to destroy its usefulness. Such a case, however, would present a question entirely different from that presented here, *viz.*, whether the city council has abused the discretionary power of control vested in it by law. While it is alleged in the complaint that the ordinance is unreasonable, the allegation is a mere conclusion, and is wholly insufficient to warrant any relief on the ground that the council abused its discretion in enacting it. (*Neary v. Northern Pac. Ry. Co.*, *ante*, p. 480, 110 Pac. 226.)

Upon the facts stated, the plaintiffs have no cause of action, and hence the court erred in granting the injunction.

The order is reversed.

Reversed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. JOHNSON, RELATOR, v. COLLINS, SHERIFF,
RESPONDENT.

(No. 2,888.)

(Submitted July 6, 1910. Decided July 7, 1910.)

[110 Pac. 526.]

*Claim and Delivery—Redelivery Bond—Sureties—Failure to
Justify—Duty of Sheriff—Mandamus—When Proper Remedy.*

*Claim and Delivery—Redelivery Bond—Sureties—Failure to Justify—
Duty of Sheriff—Mandamus—Application—Sufficiency.*

1. Application for writ of mandate, made to the supreme court, to compel a sheriff to deliver possession of personal property, seized in an action in claim and delivery and thereupon redelivered to defendant upon his furnishing the bond provided for by section 6631, Revised Codes, to plaintiff in such action because of the failure of defendant's sureties to justify, *held*, sufficient as against the contention that it did not show that the relator had exhausted his remedies in the district court, where, though not stating in terms that he had moved that court for an order requiring the officer to perform the duty imposed upon him by section 6632, it did appear therefrom that he had made application for relief and was denied it.

Same—Mandamus—Adequate Remedy at Law—What Constitutes.

2. To defeat the issuance of a writ of mandate on the ground that relator has a plain, speedy and adequate remedy in the ordinary course of law, the remedy must be one which itself enforces in some way the performance of the particular duty enjoined, and not merely one which in the end saves the party to whom the duty is owed unharmed by its nonperformance.

Same—Mandamus—Failure of Sureties to Justify—Duty of Sheriff.

3. *Held*, that where defendant in a claim and delivery action, after seizure of the property by the sheriff, desires a redelivery thereof to himself, he must not only tender to the officer the redelivery bond provided for by section 6632, Revised Codes, but also have the sureties on said bond justify, in the same manner as upon bail on arrest, as a condition precedent to his right to the return of the property, even though exception to their sufficiency is not taken by plaintiff, or notice thereof given to defendant; *held*, further, that defendant in such an action having failed to have the sureties justify, it was the duty of the sheriff, specially enjoined upon him by section 6632 above, to deliver possession to plaintiff, performance of which duty could be compelled by *mandamus*.

Same—Redelivery Bond—Right to Give—When Waived.

4. Where, in claim and delivery, defendant, at the time the sheriff served the papers and sought to take possession of the property, tendered to the officer a cash bond to retain the property, he thereby waived his right to thereafter tender a redelivery bond.

ORIGINAL application for writ of mandate by the state, on relation of John M. Johnson against John A. Collins, sheriff of Cascade county. Writ granted.

Mr. H. S. McGinley argued the cause orally in behalf of Relator.

Mr. Sam Stephenson, appearing in behalf of Respondent, argued the matter orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On the 26th of May of this year, J. M. Johnson commenced an action in the district court of Cascade county against Samuel Stephenson to recover the possession of certain personal property. The plaintiff in that action filed his affidavit as required by statute, gave an undertaking, and had his attorney indorse on the affidavit an order to the sheriff of Cascade county to seize the property in controversy. Thereafter, on the twenty-seventh day of May, the sheriff made due service on the defendant, who thereupon tendered to the sheriff cash in lieu of a redelivery bond or undertaking, but the amount so delivered was insufficient to meet the requirements of the statute. Thereafter the defendant Stephenson furnished to the sheriff a written undertaking, but the sureties thereon failed to justify within five days, or at all; and after the expiration of five days, and on the fourth day of June, the plaintiff demanded of the sheriff that he deliver possession of the property to him (plaintiff), which the sheriff refused to do. Application is now made to this court for a writ of mandate to compel the sheriff to take the property in controversy and deliver it to the plaintiff. Upon the filing of the petition in this court, an alternative writ of mandate was issued, and upon the return the sheriff appeared by counsel and filed a motion to quash the alternative writ and dismiss the proceedings, and upon this motion the cause was argued and submitted for our decision.

It is urged that the petition filed in this court does not show that the relator has exhausted his remedies in the district court; and while it is true that the petition here does not in terms state that petitioner moved the district court for an order requiring the sheriff to perform the duty imposed upon him by law, it does show that the petitioner made application to the district court for relief, which was denied him; and we are inclined to hold that the showing made is sufficient to justify the conclusion that the petitioner has exhausted his remedies in the district court, without obtaining the relief which he seeks, and to which he is apparently entitled.

It is also suggested that the petitioner has a plain remedy, by an action against the sheriff for damages; but in *Babcock v. Goodrich*, 47 Cal. 488, it is said: "To supersede the remedy by *mandamus*, a party must not only have a specific, adequate legal remedy, but one competent to afford relief upon the very subject matter of his application. (*Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711.) It is clear that an action for damages against the auditor, for neglect of duty, would not be equally convenient, beneficial and effective as the proceeding by mandate, since it would not compel him to do the specific act which the law requires him to perform." (26 Cyc. 171.) The case of *Fremont v. Crippen*, 10 Cal. 212, 70 Am. Dec. 711, involved the question of the right of the plaintiff in an action to have a writ of restitution executed by the sheriff. On petition for rehearing, the supreme court said: "The only point made in the petition which was decided in the opinion is that plaintiff's remedy was by action on the sheriff's bond, and not by *mandamus*. This objection is not well taken; the statute provides that a *mandamus* may issue 'to any inferior tribunal, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station,' and shall issue in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. Now, the execution of final process is specially enjoined by law on defendant, as a duty resulting from his office of sheriff, and

in our opinion the plaintiff in this case has no plain, speedy or adequate remedy in ordinary course of law. It is true, he might sue defendant on his bond for the damages resulting from the nonperformance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process and is the only adequate remedy. To supersede the remedy by *mandamus*, a party must not only have a specific, adequate legal remedy, but one competent to afford relief upon the very subject matter of his application. Neither a remedy by criminal prosecution (2 B. & A. 646) nor by action on the case for neglect of duty will supersede that by *mandamus*; since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual." (26 Cyc. 172.)

In *State ex rel. Brickman v. Wilson*, 123 Ala. 259, 26 South. 482, 45 L. R. A. 772, it is said: "The 'other remedy,' the existence of which will oust—or rather, prevent the invocation of—jurisdiction by *mandamus*, must be equally convenient, beneficial and effective as *mandamus*. (Citing cases.) It must be a remedy which will place the relator in *statu quo*; that is, in the same position he would have been had the duty been performed. (*Etheridge v. Hall*, 7 Port. (Ala.) 47.) Indeed, it must be more than this. It must be a remedy which itself enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party to whom the duty is owed unharmed by its nonperformance."

Section 6631, Revised Codes, provides that in an action of claim and delivery the defendant may require the return of the property to him, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties. Section 6632 then provides: "The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before the judge or clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until the jus-

tification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time or place appointed, he shall deliver the property to the plaintiff." Section 6626 provides for an exception to the sufficiency of the sureties upon the undertaking furnished by the plaintiff; and it will be observed that under that section the sureties are not required to justify unless the defendant excepts to their sufficiency and gives notice to the plaintiff. But section 6632 above omits any requirement that written notice, or any notice, be given to the defendant that the sureties upon his redelivery bond are not deemed sufficient. We must assume that the legislature had some purpose in view in omitting that requirement. And if we are to arrive at the legislative intent from the language employed by the legislature, it becomes apparent at once that the duty is imposed upon the defendant, who seeks to recover the possession of his property in a claim and delivery action, to have the sureties on his redelivery bond justify as a condition precedent to his right to the return of the property. In other words, when the defendant seeks a redelivery of his property, he must tender to the sheriff a redelivery bond and give notice to the plaintiff of not less than two nor more than five days that the sureties will justify before the judge or clerk of the court, in the manner provided for the justification of sureties upon bail on arrest. The petition before this court shows that the defendant in the claim and delivery action failed to have the sureties on his redelivery bond justify at all; and section 6632, above, imposes upon the sheriff the duty, under such circumstances, to deliver possession of the property in controversy to the plaintiff. Upon the failure of the sheriff to make such delivery, the right of the plaintiff to the relief sought seems to be plain.

Section 7214 provides that the writ of mandate may be issued by the supreme court to any person to compel the performance of an act which the law specially enjoins as a duty resulting from an office. But it is suggested that the utmost relief that can be afforded by this court will be to command the sheriff to

take possession of the property, thereby leaving to the defendant in the claim and delivery action a right to tender a redelivery bond if he so desires. But the defendant in claim and delivery has waived his right by tendering the cash bond at the time the sheriff served the papers and sought to take possession of the property. While it may be true that, technically speaking, the sheriff never actually took possession of this property from the defendant, yet the facts disclose that substantially the same thing was done, and that it was by reason of the action of the defendant in that case that actual possession was not taken.

We think the facts sufficient to show that the plaintiff is entitled to the relief which he seeks, and a peremptory writ of mandate is directed to issue conformably with the prayer of the petition.

Writ granted.

MR. JUSTICE SMITH concurs.

MR. CHIEF JUSTICE BRANTLY: In this case the right result has been reached, but I think by the wrong means. The application should have been for a writ of supervisory control, directed to the district court and requiring it to enforce the execution of its own process.

Rehearing denied September 13, 1910.

STATE EX REL. ROWLING ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 2,889.)

(Submitted July 6, 1910. Decided July 7, 1910.)

[110 Pac. 86.]

Writ of Supervisory Control—Contempt Proceedings—Questions Determinable—Metropolitan Police Law.

Writ of Supervisory Control—Contempt Proceedings—Questions Reviewable—Metropolitan Police Law.

1. In proceedings, under writ of supervisory control, to review the action of the district court in holding that the mayor of a city to whom a writ of mandate had been issued to restore certain policemen to their offices, from which they had been unlawfully ousted by him (Revised Codes, secs. 3304–3317), was not in contempt of court, the only question presented to the appellate court for determination was whether said mayor had actually and in good faith obeyed the order by restoring the officers to their places. Hence the question whether he could, as he did shortly after such restoration, relieve the men from active duty and place them on the eligible list, provided for by the Metropolitan Police Law, *supra*, and other kindred propositions not theretofore presented to the district court for adjudication, were not properly determinable.

Contempt Proceedings—Right to Office—Question not Triable.

2. The right to exercise the duties of an office cannot be tried summarily in contempt proceedings.

Same—Evasion of Order—Question Triable.

3. Under proper pleadings, the district court may, in contempt proceedings, determine the question whether the action of the contemnor, in shortly after literally obeying its order, taking such steps as to bring about the same condition of affairs as that which the order of the court sought to remedy, was a mere subterfuge to evade the law and avoid actual compliance with the order.

ORIGINAL application by the state, on the relation of J. H. Rowling and others, for a writ of supervisory control to the district court of the second judicial district in and for Silver Bow county and Honorable John B. McClernan, a judge thereof. Dismissed.

Messrs. Kirk, Bourquin & Kirk, and Mr. W. E. Carroll, for Relators, submitted a brief. Mr. George M. Bourquin argued the cause orally.

Mr. Edwin M. Lamb, appearing in behalf of Respondents, argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the court.

Prior to May, 1909, the relators were duly appointed and acting permanent police officers of the city of Butte. On December 18, 1909, the Honorable Charles P. Nevin, mayor of that city, served them with notice that they were discharged from the police force. Thereupon, upon proper proceedings being instituted, the district court of Silver Bow county, on April 27, 1910, held that he had no such authority, and ordered him to reinstate them in office as policemen and members of the police department. On the morning of April 28, 1910, the mayor obeyed the order of the court by restoring relators to active duty upon the force, and on the afternoon of that day, after they had each served eight hours, he assumed to relegate them to the eligible list without pay, giving as a reason therefor that the police department was greater numerically than the needs of the city required. His notice to them was as follows:

“Dear Sir: Owing to the condition of the finances of the city of Butte, which require retrenchment and economy, and for the further reason that the police department is greater numerically than the needs of the city require, I have this day reduced the number of the police department to the extent of fifteen, and in order to accomplish this purpose and this end I have put you (together with fourteen others) out of active service as a member of said department, and your name is placed upon the eligible list of said department, being the list of persons eligible to appointment under the Act of the legislative assembly of the state of Montana known as Chapter 136, Session Laws 1907 (Revised Codes, secs. 3304–3317), and you are therefore upon said list, with the right to be returned to duty and position in said department when the financial condition of the city will permit and the exigencies of the service require it.”

Upon demand being made of the mayor “that he obey and comply with the mandate of the district court and restore peti-

tioners to their offices and the duties and salaries thereof," he refused. On May 3, 1910, they instituted contempt proceedings in the district court to compel the mayor "to obey and comply with" the writ of mandate theretofore issued. The facts set forth in the application for the order were the same as those just recited, with the addition that it is alleged in such application that "no change has occurred nor have any new conditions arisen which would alter the right of these relators to the relief afforded them by said judgment and order since its rendition, and the attempted placing of these relators upon the 'eligible list' was and is intended by the respondent as an invasion of the provisions of the Metropolitan Police Law and a contemptuous and willful disregard and circumvention of the mandate of the court." In response to a citation duly issued, the mayor answered that he had fully complied with the original mandate of the court; that he had set aside his former order removing the relators from the police force, and had restored them to their places as members thereof, in obedience to the order of the court; that he recognized them as members of the force, but that "for the purpose of curtailing the expenses of the city and of avoiding a needlessly large police force" they were retired from active service. The district court adjudged that the mayor was not in contempt, and discharged the order to show cause why he should not be punished.

The matter comes to this court on application for a writ of supervisory control to compel the district court and the Honorable John B. McClernan, a judge thereof, to show cause why the writ of mandate above referred to should not be enforced and the mayor compelled to obey the same. It is further alleged in the petition filed in this court as follows: "And your petitioners respectfully show that by the evidence aforesaid it appeared that said mayor had during his incumbency, and prior to his discharge of petitioners, appointed to and upon said force in excess of thirteen members mostly of no police experience, who at the time last aforesaid, at all times hitherto, and now continue in active service thereon, discharging the duties and en-

joying the salaries thereof, two of which at the time so appointed by him had not been residents of said city for a period of two years prior to their appointment as aforesaid, and also that for the fiscal year ending on the first Monday in May, both of 1910 and 1911, the council of said municipality appropriated more money to pay the expense and salaries of the police force aforesaid than was necessary for and than would be required to pay such expense and salaries for said police force, including those appointed by the said mayor as aforesaid and also petitioners."

The respondents have made return to an order to show cause heretofore issued, in which they, in effect, admit all of the material allegations of the petition, and in addition thereto we find the following: "Admit that by the testimony in the *mandamus* proceedings it appeared that prior to the fifteenth day of December, 1909, vacancies occurring by deaths, resignations, and removal in police department had been filled, and in this connection allege that the testimony taken at said time also showed the appropriation of the police department for the fiscal year ending the first Monday in May, 1910, to be \$110,000, and the appropriation for the fiscal year ending the first Monday in May, 1911, to be \$90,000; also that by the testimony taken at said time it was made to appear that one of the appointees to fill a vacancy, as aforesaid, at the time of his appointment resided a short distance without the city limits, but in this connection the respondents allege that said appointment was made prior to December 15, 1909, and there was no testimony showing that the said Charles P. Nevin, as mayor of the city of Butte, had any knowledge of that fact."

Upon the cause being called for argument in this court, it was stated by counsel that the pleadings appeared to raise certain issues of fact; but it was finally agreed to submit the matter upon the petition and the return thereto, without further pleading or other proceeding. It is contended by counsel for the relators (1) that the mayor has no authority under the law to reduce the active police force for any reason, economical or

otherwise; (2) that the power to reduce the active force is vested in the city council alone; and (3) that, if the mayor's power be conceded, it must be exercised in good faith, and not with a view of putting his own appointees in the places of those policemen who are retired from active service. They argue that, if a policeman is taken from active service for any sufficient reason and placed upon the waiting list of eligibles, when occasion arises to increase the active force, he must be given the preference over one who has never served, and that when several policemen are relieved from active service they must be restored to duty, when the necessities of the city demand increased police protection, in the order in which they were taken off the active list. Counsel in their brief say: "Nowhere does the Metropolitan Police Law authorize the mayor to relegate patrolmen to the eligible list on the score of economy."

But the sole question for determination is: Was the district court correct in holding that the mayor had fully complied with its original mandate, and was therefore not in contempt? The question of his power to relieve policemen from active duty for reasons of economy was not before the court in either the *mandamus* or contempt proceedings. It could not have arisen in the *mandamus* proceedings, for the reason that the relators were not temporarily relieved from duty in the first instance; but the right was claimed to discharge them permanently from the force, and the only question before the court was whether any such power was lodged in the mayor. The court properly held that no such power existed, and ordered that they be restored to their places as members of the force. It could not arise in the contempt proceedings, because the only question for determination there was whether the mayor had actually and in good faith obeyed its order by restoring the relators to their original status. The record shows that he complied literally with the order. But he now claims that, conceding he had no such power as that first asserted by him, he yet has the authority to reduce the force, because it is unnecessarily large, or for economical reasons, and that he has in good faith exercised the power by relieving the relators from active duty. Assuredly

this power rests somewhere. Whether in the mayor or the council is a question to be determined. But the district court, as we read the pleadings, has had no opportunity to decide it. No such issue could properly have been presented to that court upon motion to punish as for a contempt for failure to restore the relators to their places as policemen. The act now complained of is an entirely different one from that to which exception was taken in the *mandamus* proceedings, which the court held to have been unauthorized; and unless it can be construed to be a mere device to evade the order of the court, and accomplish by indirection the same result as that originally sought, then it cannot be said to have been an act demanding punishment as for a contempt of court. The right to exercise the duties of an office cannot be tried summarily in contempt proceedings.

The allegation that the testimony in the *mandamus* proceeding showed that Mayor Nevin, during his incumbency of office and prior to the discharge of relators, had appointed an equal number of new policemen, who should, as relators now claim, have been relieved from active service instead of themselves, does not change the situation. The question of the mayor's right to do that was not properly determinable in the *mandamus* proceedings; neither is it raised by the pleadings in this court. It is a new question, which should be presented to the district court in a new proceeding, as should also the question as to where the power to reduce the force resides. If these questions should be resolved against the mayor, and he then refuses to restore the petitioners to active service, he would be in contempt. It was admitted in argument that in relieving relators from active duty the mayor acted in good faith in exercise of an authority which he claimed to have, and no inference of bad faith on his part is predicated in the petition upon the allegation that prior to the discharge of relators he had appointed thirteen other policemen.

We are not to be understood as holding that in the contempt proceedings the district court would not have been warranted in determining the question of fact whether the action of the

mayor under all the circumstances was not a mere subterfuge to evade the law and avoid actual compliance with the order of the court. That question might properly have been determined. But no such issue appears to have been made in that court, and in this court, as hereinbefore stated, counsel for relators announced that they were content to submit for determination the questions of law alone arising upon the pleadings.

We think the district court properly discharged the order to show cause. The proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

O'BRIEN, RESPONDENT, v. DRINKENBERG ET AL., APPELLANTS.

(No. 2,861.)

(Submitted September 12, 1910. Decided September 26, 1910.)

[111 Pac. 137.]

Cities and Towns—Sidewalks—Injunction—Meetings of Council—Special or Adjourned—Powers of Council—Minutes—Municipal Contracts—Validity—Findings—Evidence—Insufficiency.

Cities and Towns—Meetings of Council—Special—Burden of Proof.

1. Plaintiff in an injunction suit to restrain the payment of municipal funds for work done in repairing sidewalks, one ground of whose complaint was that though the meeting of the council at which the walk was ordered replaced was a special one, it was held without any notice, proclamation or message of the mayor required to be given by section 3250, Revised Codes, had the burden of proving that the meeting was a special one.

District Courts—Findings—Scope.

2. A court may not go outside the issues and make findings upon questions not in dispute.

Cities and Towns—Sidewalks—Powers of Council—Discretion.

3. In the absence of an allegation that the city council, in ordering a wooden sidewalk to be replaced by a concrete walk, abused its discretion or was guilty of fraud, a finding that such walk did not need

replacing was immaterial, since the council's action in the premises was in the exercise of a legislative function, and subject to judicial review only for fraud or abuse of discretion.

Same—Town Council—Special Meeting—Call for—Evidence—Insufficiency.

4. Where the plaintiff, in order to substantiate his claim that a mayor in calling a special meeting of the city council had not issued a proper call as required by subdivision 9 of section 3250, Revised Codes, made no attempt to introduce and have read the call, but simply introduced the minutes of such meeting, which tended to contradict the allegation of the complaint in that regard, a finding of the court in favor of plaintiff on that issue was not sustained by the evidence.

Same—Minutes of Council—Manner of Keeping.

5. The law does not contemplate that the proceedings of the council of a municipality shall be kept with the formality and nicety of the minutes of a court of record.

Same—Sidewalks—Ordinances—Findings.

6. The burden of proving the allegation that there was no ordinance authorizing the town council to condemn a board walk and order its replacement by a concrete one was not sustained by plaintiff in producing testimony of a witness who stated that he had examined the book of ordinances of the town and that there was no resolution or ordinance to be found therein fixing the grade of the town, and by that of another to the effect that there was a sidewalk ordinance, but that he was not "well enough versed in the ordinances to know."

Same—Contracts—Bids—Evidence—Findings.

7. Evidence held insufficient to support a finding of the court that contracts aggregating in amount the sum of \$461 for the construction of cement sidewalks had been let by the town council without receiving bids for such work.

Same—Contracts—Validity—Attack.

8. To successfully attack the letting of a contract for a municipal improvement, plaintiff must show that it was not let to the lowest responsible bidder, that there was not any opportunity afforded for competitive bidding, or that there was collusion or bad faith on the part of the council, or such gross mistake as to preclude the exercise of sound judgment.

Appeal from District Court, Ravalli County; Henry L. Myers, Judge.

ACTION by W. P. O'Brien against F. H. Drinkenberg, as mayor, and others, as aldermen, of the town of Hamilton. From a judgment for plaintiff and from an order denying them a new trial, defendants appeal. Reversed and remanded.

Mr. C. S. Wagner submitted a brief, and argued the cause orally in behalf of Appellants.

In the absence of affirmative proof to the contrary, it will be presumed that the meetings and adjournments of the council are regular. (*Duniway v. City of Portland*, 47 Or. 103, 81 Pac.

945; *Beck et al. v. Holland et al.*, 29 Mont. 234, 74 Pac. 410; 28 Cyc. 328.)

Neither section 3253, Revised Codes of 1907, which prescribe the duties of the clerk, nor section 3263 of the same Code, which provides for the recording of the ayes and noes upon certain propositions, make any requirements, as a condition prerequisite to the validity of the proceedings of a council, that such proceedings must actually be recorded. This being true, the duties of the clerk should be held, in this state, to be directory rather than mandatory. (*Marth v. City of Kingfisher*, 22 Okl. 602, 98 Pac. 436; *Belknap v. Miller*, 52 Ill. App. 617; *Striker v. Kelly*, 7 Hill (N. Y.), 9; *State v. Minneapolis R. Co.*, 39 Minn. 219, 39 N. W. 153; *Barber Asphalt Paving Co. v. Hunt*, 100 Mo. 22, 18 Am. St. Rep. 530, 13 S. W. 98, 8 L. R. A. 110; *City of Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002; *Marion Water Co. v. Marion*, 121 Iowa, 306, 96 N. W. 883; *State v. Vail*, 53 Iowa, 550, 5 N. W. 709; *Lexington v. Headly*, 5 Bush (Ky.), 508; *Downing v. City of Miltonvale*, 36 Kan. 740, 14 Pac. 281.)

The record discloses that when the motion was put by the chair, all members voted "Aye." The vote was unanimous. There were no "Noes." The roll-call discloses who was present at the meeting. All present voted for the measure. It was not necessary, under these circumstances, to name the persons who voted for it. The minutes are sufficient to show that a roll-call was taken, and that upon such vote the motion to replace the wooden sidewalk with a cement one was carried unanimously, all members voting "Aye." (*Goodyear Rubber Co. v. City of Eureka*, 135 Cal. 613, 67 Pac. 1043; *Marion Water Co. v. Marion*, 121 Iowa, 306, 96 N. W. 883; 28 Cyc. 334, 344.)

In behalf of Respondent, there was a brief by Messrs. R. A. O'Hara, J. H. Sappiro, and Messrs. Crutchfield & Taylor. Mr. Thomas J. Edwards argued the cause orally.

The power to establish grades for streets is one of these delegated powers, and there is only one way that the council can act, and that is by by-law, ordinance or resolution. (*Smith v. Duncan*, 77 Ind. 92; *Thompson v. Boonville*, 61 Mo. 282; *Zable v.*

Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *McCrowell v. Bristol*, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653; *Chicago & N. P. R. Co. v. City of Chicago*, 174 Ill. 439, 51 N. E. 596; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181; *State ex rel. Shannon v. Judges*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122.)

Any ordinance directing the construction of sidewalks on an official grade, when in fact no official grade has been established by ordinance, is void. (*Brewster v. City of Peru*, 180 Ill. 124, 54 N. E. 233; *Craig v. People*, 193 Ill. 199, 61 N. E. 1072.)

The provision of section 3263, Revised Codes, that "the yeas and nays must be called and recorded on the final passage of any by-law, ordinance, resolution or the making of any contract," must be followed by town councils. It is a mandatory enactment. (*Pickton v. City of Fargo*, 10 N. D. 469, 88 N. W. 90; *Tracey v. People*, 6 Colo. 151; *Town of Olin v. Myers*, 55 Iowa, 209, 7 N. W. 509; *Sullivan v. Leadville*, 11 Colo. 483, 18 Pac. 736; 1 Dillon's Municipal Corporations, p. 367; *Morrison v. City of Lawrence*, 98 Mass. 219; *Steckert v. City of East Saginaw*, 22 Mich. 104; *Cutler v. Town of Russellville*, 40 Ark. 105; *Rich v. City of Chicago*, 59 Ill. 286; *O'Neil v. Tyler*, 3 N. D. 47, 53 N. W. 434.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is a suit by a resident taxpayer of the town of Hamilton to secure an injunction restraining the mayor and town council from paying out of the town treasury certain funds for work done in repairing sidewalks. Plaintiff recovered judgment, and defendants appealed from the judgment and from an order denying them a new trial.

The amended complaint alleges that the town council, at a special meeting which was held on September 20, 1909, without authority, made an order condemning the board sidewalks within certain designated boundaries (the fire limits), and directing the owners of abutting property to replace the same with sidewalks of concrete. It is then alleged that the sidewalks so condemned were in good condition, and sufficient for the purposes for which used. It is further alleged that at a special meeting of the coun-

cil held on October 25, 1909—and which meeting, it is alleged, was held “without authority and without a proper message from the defendant F. H. Drinkenberg as mayor of said town”—it was ordered that the board walk along lots 7 and 8, in block 27 (the property of R. A. O'Hara), be replaced by a concrete walk, and that, though the work to be done was one entire piece of work, the town council let two contracts therefor to avoid and evade the provisions of section 3278, Revised Codes of Montana; that these contracts were let without notice and without bids therefor having been received; that the contractors proceeded to do the work, and, unless enjoined, the defendant will issue warrants of the town to the contractors and pay out funds of the town for the work so done. The foregoing brief *résumé* of the complaint is sufficient to indicate the theory upon which plaintiff proceeded and to illustrate the views which we express.

The answer of the defendants contains a general denial of the foregoing allegations of the complaint, and then sets forth somewhat in detail the proceedings taken to condemn the walks and let the contracts for replacing them. It alleges that the contracts were let for sums aggregating about \$500. The new matter pleaded in the answer was denied in a reply. The cause was tried to the court sitting without a jury. When the plaintiff rested his case, the defendants declined to introduce any evidence, and the cause was submitted upon the case made by the plaintiff.

The trial court made numerous findings of fact, all in favor of plaintiff's contention, drew conclusions of law therefrom, and rendered and entered a judgment or decree which contains a permanent injunction restraining the defendants from paying, or ordering the payment of, any money from the town treasury to Kaiser or Jermain, the contractors mentioned above, for or on account of the work done in replacing the sidewalk along lots 7 and 8, block 27; and they are further enjoined from tearing up or replacing, or taking any further proceedings with reference to, any of the other sidewalks condemned at the meeting held on September 20, 1909, by virtue of the action taken at that meeting.

All the evidence adduced at the trial is preserved and presented here in a bill of exceptions, and it is contended by appellants that the evidence fails to sustain the findings made by the trial court.

1. The first material finding is that the meeting of the town council held on September 20, 1909, was not a regular nor an adjourned meeting of the council, but was a special meeting, and was held without any notice, proclamation or message from the mayor, and without any authority whatever. To prove the allegation of the complaint that the meeting of September 20, 1909, was a special meeting of the board, counsel for plaintiff offered in evidence the last entry in the minutes of the council meeting of September 8, 1909, which was the last meeting prior to the one held on September 20. That entry reads, "There being no further business, meeting adjourned," and also introduced the minutes of the meeting of September 20, which open with this entry: "Town council met in adjourned session with the following members present," etc. The other entries in the minutes of the meeting of September 8 were not before the trial court and are not in this record, and it is impossible to say whether that meeting was a regular or special one. The entry from the minutes of that meeting, introduced in evidence, is not even inconsistent with the idea that, before adjournment, the council may have provided for an adjourned session for September 20. In fact, there is not anything in the record to show that the minutes of the meeting of September 8 were ever approved or adopted by the council, or signed by the mayor. (Revised Codes, sec. 3251.) The minutes of the meeting of September 20, recite that it was an adjourned session of the council. They show that all members of the council were present. The city clerk, who was a witness for plaintiff, testified that it was supposed to be an adjourned session, while the general nature of the business transacted tends to indicate that such was the character of the meeting. An issue having been made in the pleadings as to whether the meeting of September 20 was a special meeting of the council, and plaintiff, having assumed the affirmative of the issue, had

to sustain the burden of proof, and, upon the record here presented, it appears to us that he failed altogether.

2. The trial court next finds that the motion to condemn the sidewalks in question was carried by a *viva voce* vote. The only evidence in the record touching this matter is found in the minutes of the meeting, which read: "On motion of Hayes, seconded by Lagerquist, the council ordered condemned all board walks on both sides of Main street from Front to Third, also one block north and one block south on both sides of Second street, and owners were to rebuild same in concrete."

Section 3263 of the Revised Codes provides: "The ayes and noes must be called and recorded on the final passage of any ordinance, by-law, or resolution, or making any contract. * * * " Assuming for the purposes of this case, but without deciding, that the minutes should record the vote upon a motion of the character of the one mentioned in the minutes above, it is apparent at once that the ayes and noes were not recorded if taken; but the evidence offered does not prove that the vote was taken *viva voce*. However, all this is really beside the question, for there is not any allegation in the complaint that the vote was taken *viva voce*, and no complaint is made of any irregularity in the vote so far as the manner in which it was taken or recorded is concerned. There was not any issue made by the pleadings, and it is elementary that the court cannot go outside the issues made and make findings upon questions not in dispute. (*Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. 763; *Harris v. Lloyd*, 11 Mont. 390, 28 Am. St. Rep. 475, 28 Pac. 736.)

3. The trial court found that at the time the sidewalk along lots 7 and 8, block 27, was condemned, it was in good condition, sufficient for the purpose for which used, was not dangerous, and did not need repair or replacement. There is not any allegation in the complaint that in condemning this sidewalk and ordering it replaced by a concrete walk, the town council abused its discretion or was guilty of fraud, and, in the absence of such allegations, the finding made is immaterial. The power sought to be exercised by the town council is specifically conferred by subdivision 65, section 3259, Revised Codes. In condemning this

sidewalk and ordering a new one in its stead, the town council was exercising a legislative function, and, except for fraud or abuse of discretion, its action is not subject to judicial review. In principle the decision of this court in *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410, is directly in point, and sustains this view of the law.

In *Jones v. Chicago*, 213 Ill. 92, 72 N. E. 798, the supreme court of Illinois said: "The municipal authorities are the best judges of the necessity for the improvement of public streets and alleys. Merely because witnesses may think an improvement is unnecessary will not justify a court in substituting its judgment for that of the municipal authorities."

The evidence is not very definite or certain as to the condition of the board walk which was replaced. It does not appear how long it had been in use; but in *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371, the supreme court of Kentucky, considering the same question, said: "While the proof is conflicting as to the condition of the old sidewalk when it was torn up, and the preponderance of the evidence would show that it was not, at least, in a bad condition, still it had been down for twenty-two years, and there is nothing in the proof to establish such a state of case as to justify a court of equity in interfering with the decision of the general council in a matter which the law has confided to its jurisdiction."

4. Again, the trial court found that the meeting of October 25 was a special meeting of the council, not called as provided by subdivision 9, section 3250, Revised Codes, in that there was not "any proper or sufficient call, message or proclamation therefor or notice thereof from the said mayor, as to the business thereat attempted to be transacted; and without any notice thereof to the plaintiff or the said R. A. O'Hara." The statute above referred to reads as follows: "Sec. 3250. The mayor is the chief executive officer of the city or town, and has power:
* * * (9) To call special meetings of the council, and when so called he must state by message the object of the meeting, and the business of the meeting must be restricted to the object

stated." It will be observed that a formal proclamation from the mayor is not necessary to convene the council in special session. Neither does the statute provide that notice shall be given. It certainly does not require that notice shall be given to every taxpayer, nor does it specify the particular form of the call. The law does require that the mayor shall deliver to the council a message stating the object of the meeting. The only evidence in the record bearing upon the question now before us is found in the minutes of the meeting of October 25, which read as follows:

"Hamilton, Montana, October 25, 1909.

"Town Council met in special session pursuant to proclamation of the mayor at 7:30 P. M. at the regular place of meeting in the town hall. The proclamation of the mayor calling the meeting was read, and it appearing thereupon that the meeting was called for the purpose of taking appropriate action relative to the construction of cement sidewalks within the fire limits of said town, to hear report of the street and alley committee of the council and of the street commissioner relative to the service of notice to build such sidewalks, and to ascertain whether the previous orders of the street and alley committee were complied with, and to do and perform such other business as might lawfully come before the council," etc.

There was not any attempt made by the plaintiff to have produced and read the message or proclamation of the mayor, and, as the plaintiff had the burden of proof, he wholly failed to sustain the allegation of his complaint, assuming that his pleading is sufficient. The evidence which plaintiff did introduce, viz., the minute entry above, tends strongly to contradict the allegation of the complaint and the finding of the court. It furnishes, at least, some evidence that a message from the mayor was delivered to the council, and shows generally the contents of such message. The law never contemplated that the proceedings of a town or village council should be kept with all the formality and legal nicety of the minutes of a court of record. (28 Cyc. 344.) The evidence wholly fails to sustain this finding of the trial court.

5. The court also found that the council ordered the O'Hara walk replaced, and let the contracts for the work upon *viva voce* votes and without a roll-call and record of the aye and no vote; but neither of these findings can be sustained. There is not any allegation in the complaint upon the subject. There was not any issue joined, and these findings must be disregarded as beyond the issues made. What we have said in paragraph 2 of this opinion is applicable here.

6. The court made finding No. 19, as follows: "(19) That there is not shown to exist or to have ever existed any ordinance or by-law of said town whereby the mayor and town council of said town, even when duly regularly convened, might or could authoritatively do any of the things, or are or were empowered to do any of the things, by defendants assumed and attempted to be done, as aforesaid, at said meeting of September 20, 1909, or at said meeting of October 25, 1909." This finding indicates that the trial court in this instance imposed the burden of proof upon defendants, whereas the burden was upon plaintiff, who alleged that there was not any ordinance authorizing the council to do the things which were ordered done, to show that fact. In support of the issue made, plaintiff called one Sapiro as a witness, who testified that he had examined the book of ordinances of the town, and then said: "There is no resolution or ordinance, recorded in that book, fixing the grade for the town of Hamilton." Plaintiff also called as his witness the town clerk, and the following evidence was adduced: "Q. Have you in your possession, as town clerk, any specifications for the construction of cement sidewalks, approved and adopted by the town of Hamilton? A. Well, we have. There is a sidewalk ordinance. I am not well enough versed in the ordinance to know." We think this evidence—which is all there is upon the subject—fails to support finding No. 19, and, furthermore, that the finding in the negative form in which it is drawn is immaterial to any issue made by the pleadings.

7. The court also found that there is not any by-law, ordinance or other authority by which the town can compel the abutting property owner to reimburse it for the expense incurred in mak-

ing the improvement. As to whether there is any ordinance upon the subject, the record is silent, except as indicated in the paragraph above. The authority invoked by the town is found in subdivision 65 of section 3259, above.

8. The court also found that at the meeting of October 25 the council let two separate contracts for one entire piece of work: that the aggregate amount of the two contracts was \$461; and that the contracts were let "without notice thereof and without having advertised for bids therefor, and without receiving or having any bids therefor."

Plaintiff called the town clerk as a witness, who testified that he had never had in his possession any bid from either Kaiser or Jermain, the contractors who did the work, for the work which was done in replacing the sidewalk along the O'Hara property; but the clerk also testified that he was not present at the meeting of the council on October 25, while the minutes of that meeting, which were approved by the council, after referring to the walks now under consideration, recite that: "Bids for the construction of said sidewalks were then called for, and T. P. Kaiser was awarded the contract for constructing said sidewalk for a distance of sixty feet along Main street in front of said lots, and at the junction of Second and Main streets, and for a distance of twenty feet along Second street immediately north of Main street, at twenty cents a square foot, measuring from inner edge or for the total sum of \$216. Mr. Jermain was awarded the contract for the construction of sidewalk Second street abutting lot 7 block 27, except twenty feet contiguous to Main street at the rate of twenty cents a square foot measuring from inner edge to bottom of curb or \$245 for the entire work." This is all the evidence in the record upon this subject, and we think it fails altogether to support the finding that there were not any bids received.

There is not any charge in the complaint that the work was not let to the lowest responsible bidders, or that there was any bad faith on the part of the council or any collusion in letting the bids, or that the work could have been done for any less sum than that comprehended in the two contracts; but it is contended

that the council was without authority to let a contract for work costing more than \$250, without notice and competitive bids, and that the council attempted to avoid this by splitting up the one entire piece of work and letting two contracts therefor, neither of which entailed an outlay of \$250, but both of which called for an expenditure of more than that amount. So far as applicable here, section 3278, Revised Codes, provides: "All contracts for work, or for supplies, or material, for which must be paid a sum exceeding two hundred and fifty (250) dollars, must be let to the lowest responsible bidder, under such regulations as the council may prescribe. * * * " It will be observed that the statute does not require notice to be given, and in *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092, this court said: "It is the general rule that, when the authorities of a municipality are required by statute to let contracts to the lowest bidder, a contract not so awarded is illegal. (Tiedeman on Municipal Corporations, sec. 172.) Bids need not be called for unless the statute requires it; but, if notice, advertising and similar preliminaries are required, a contract entered into without attention to these preliminaries will be held invalid."

We have set forth above all the evidence upon this subject. We have not any means of knowing whether there were or were not other bidders than Kaiser and Jermain present at the meeting of October 25, whether there were or were not other bids received by the council, or whether or not an equal opportunity was or was not given other contractors to bid upon the work. In *State ex rel. Lambert v. Coad*, above, this court quoted with approval from *Dement v. Rokker*, 126 Ill. 174, 19 N. E. 33, the following: "Letting by contract to 'the lowest responsible bidder' necessarily implies equal opportunity to, and freedom in, all whose interests or inclinations might thus impel them to compete at the bidding. No one may be compelled to bid at such a letting, but there must be entire fairness and freedom in competition. * * * The manifest purpose in requiring the contract to be let to 'the lowest responsible bidder' is to protect the state against imposition and extortion."

In view of the evidence set forth above, we are unable to sustain the finding that these contracts were let without any bids having been received by the council.

It is entirely immaterial that the council let two contracts. The work might have been let in one contract, and, if it had been done, to successfully attack such proceeding, plaintiff would have to show that the contract was not let to the lowest responsible bidder, that there was not any opportunity afforded for competitive bidding, or that there was collusion or bad faith on the part of the council, or such gross mistake as to preclude the exercise of sound judgment, and in this he failed. The evidence does not show what, if any, regulations the council had prescribed for receiving bids or letting contracts.

The other findings are not sufficiently material to warrant consideration. At the close of plaintiff's case, the trial court should have found that plaintiff had not introduced evidence sufficient to show that he was entitled to any relief.

The judgment and order of the district court are reversed, and the cause is remanded with directions that the complaint be dismissed and judgment entered in favor of defendants for their costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

CONSOLIDATED GOLD AND SAPPHIRE MINING CO., RE-
SPONDENT, v. STRUTHERS ET AL., APPELLANTS.

(No. 2,847.)

(Submitted September 13, 1910. Decided September 26, 1910.)

[111 Pac. 150.]

*Injunction Pendente Lite—Sawmills—Dumping Sawdust into
Streams—Evidence—Sufficiency—Findings in Equity Cases—
Review—Estoppel in Pais.*

Injunction Pendente Lite—Evidence—Sufficiency—Discretion.

1. It is not essential to the validity of an order granting an injunction *pendente lite* that the evidence in support thereof should be of such character as to warrant permanent injunctive relief in plaintiff's favor at the trial upon the merits. The granting of such an order lies within the sound discretion of the trial court, subject to reversal only in case of manifest abuse of such discretion.

Equity Cases—Findings—Review.

2. The supreme court will, on appeal, accept the findings of the trial court in equity proceedings claimed to be unwarranted by the evidence, unless the appealing party is able to show that the evidence preponderates against them.

Injunction Pendente Lite—Evidence—Sufficiency.

3. Evidence introduced in an action in which the district court granted an injunction *pendente lite* restraining the defendants from dumping sawdust into a stream, or upon its banks, causing interference with plaintiff's placer mining operations, *held* not to show a preponderance against the trial court's finding in favor of plaintiff's contention, so as to justify a reversal of the court's order.

Same—Dumping Sawdust into Streams—Estoppel in Pais.

4. *Obiter*: If plaintiff mining company was estopped to deny the right of defendants to maintain or operate a sawmill upon a portion of its mining claim, because plaintiff had stood by silent while they expended large sums of money in erecting it and a dam in connection therewith [a question raised, but *held* immaterial on appeal from an order granting an injunction *pendente lite*], it cannot be said to be estopped to deny the right of defendants to operate it in a manner destructive of its rights in the premises, since it had a right to assume that the sawmill operations would be carried on so as not to create a nuisance.

*'Appeal from District Court, Deer Lodge County; Geo. B.
Winston, Judge.*

ACTION by the Consolidated Gold and Sapphire Mining Company against A. D. Struthers and others. From an order granting an injunction *pendente lite*, defendants appeal. Affirmed.

Messrs. Rodgers & Rodgers, and *Mr. John Lindsay*, submitted a brief in behalf of Appellants. *Mr. Lindsay* argued the cause orally.

Messrs. Kirk, Bourquin & Kirk, and *Mr. C. N. Davidson*, submitted a brief for Respondent. *Mr. George M. Bourquin* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Upon the filing of the verified complaint, the district court of Deer Lodge county issued an order to show cause why an injunction should not be granted restraining defendants from doing certain things of which complaint was made by plaintiff. The defendants appeared by answer, and a hearing was had, at the conclusion of which the court granted an injunction *pendente lite*, by the terms of which defendants "are enjoined and restrained from depositing sawdust in the stream flowing through plaintiff's Ruby First placer claim described in the complaint, or upon the banks thereof, from whence it would ultimately naturally deposit in said stream above plaintiff's said placer claim, or upon the adjacent placer ground, and valley land, within said Ruby First placer claim, and as distinguished from the hill lands." From the order granting this injunction defendants appealed.

The injunction is not so broad as requested by plaintiff in its complaint. It refers only to one ground of complaint made, and it will therefore be necessary to consider the pleadings only so far as they relate to the particular matter covered by the injunction. The plaintiff alleges that it is the owner of the Ruby First placer mining claim, that it has expended large sums of money in constructing a steam dredge for conducting its placer mining operations on said claim, and in constructing a dam necessary for impounding water sufficient for its use. It then alleges that the defendants have built and are operating a sawmill immediately above the point where plaintiff is intending to operate its dredge; that there is a stream of water flowing by the sawmill

and through the placer claim; that defendants are depositing sawdust from their mill in this stream and upon the banks thereof, so that it naturally will be deposited in the stream; that such sawdust is being carried down said stream and intermingled with the sand, gravel, and soil of plaintiff's placer claim at the point where it intends to operate its dredge; that the sawdust thus deposited will clog and obstruct the machinery of the dredge, and prevent plaintiff from working it and from extracting the valuable minerals from the ground; and that defendants threaten to continue such operations. Most of these allegations are denied in the answer, and defendants plead affirmatively matters by way of estoppel *in pais*. In their brief counsel for appellants say: "The district court was not justified in issuing an injunction *pendente lite* restraining appellants from depositing sawdust in the stream flowing through the so-called Ruby First placer, etc., as the proof wholly failed to show that such had been done or was contemplated by appellants, but, on the contrary, demonstrated that the sawdust pile of appellants, to which sawdust was flumed from their sawmill, was so far removed from the creek and so many obstructions intervened that in the natural course of events it could not, and did not, work its way into the creek, and that the respondent has been in no wise damaged thereby."

Upon the hearing plaintiff introduced the testimony of a civil engineer who had been upon the ground a short time before the hearing, making surveys, and who observed the conditions about the sawmill and at the sawdust dump. This witness testified that the sawdust was carried away from the mill to the dump by means of water running through a box flume. Some of the pertinent testimony given by this witness follows: "Q. And how did this dump lie at this time, with reference to the creek itself, through the ground? A. This dump is to the southwest of the creek, but there is a great deal of sawdust that is going down in the creek bed. It is distributed all the way down to the dredge. * * * Q. And how did the water act after it had dumped upon this sawdust heap, or did you observe it? A. It would always dam itself up, and it would form a dam on the pile until

the pressure got great enough to break it, and then it would be released. Q. And where would it run to? A. It would run in all directions. Q. Any of it go down the creek? A. Some of it would. Q. Carrying sawdust with it, that you observed? A. Yes."

A witness Simon, for the plaintiff, testified that, while the main sawdust dump is some fifty feet from the creek, the sawdust is scattered about the creek bank and into the creek, and has been carried down the creek and deposited on the placer ground from the mill to a point below where the dredge was then located, a distance of about half a mile. This witness also testified that the sawdust, when water-soaked, sinks and is intermingled with the sand, gravel, and dirt; that, if deposited in the sand, gravel, and dirt to be worked by the dredge, the sawdust would clog up and obstruct the machinery, particularly the trommels and riffles, to such an extent that the valuable minerals would not be saved, and would also interfere with the working of the pumps.

Two other witnesses for plaintiff, William and John Goodwin, who constructed the dredge for plaintiff and who appear to be men of wide experience in handling dredges in placer operations, testified to substantially the same facts so far as the effect which the sawdust would have upon the operations of the machinery is concerned. The witness William Goodwin also testified that there was sawdust on the placer claim which had been washed down from the mill. It is admitted in the answer that defendants claim the right to continue their operations of the mill as theretofore conducted.

Much of the argument of counsel for appellants might be *apropos* if this question arose upon an appeal from an order granting a permanent injunction after a hearing upon the merits; but the rule applicable in such a case is not the rule to be applied in a case of an injunction *pendente lite*. And whether or not we might deem the exigencies of this case, as disclosed at the hearing, sufficient to warrant permanent relief by way of injunction, is not now for consideration. It is not essential to the validity of an order granting an injunction *pendente lite* that the evidence in support of the order should be of such character as to

warrant permanent relief in plaintiff's favor at the trial upon the merits. (*Heinze v. Boston & Mont. C. C. & S. Min. Co.*, 26 Mont. 265, 67 Pac. 1134.) In fact, the granting of an order for an injunction *pendente lite* is within the sound discretion of the trial court, and, in the absence of a manifest abuse of such discretion, the order will be affirmed. (*Parrot S. & C. Co. v. Heinze*, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326, 53 L. R. A. 491; *Heinze v. Boston & Mont. C. C. & S. Min. Co.*, 30 Mont. 484, 77 Pac. 421.)

However much the evidence offered by the defendants may conflict with that given by the plaintiff, we do not feel disposed to interfere with the finding of the trial court that the evidence preponderates in favor of plaintiff's contention. The trial court, in the first instance, was the sole judge of the credibility of the witnesses and of the weight to be given to their testimony. It occupied a position much more advantageous than does this court, in that it heard the witnesses testify, observed their demeanor, and was therefore much better qualified to weigh the evidence. Under such circumstances, this court has repeatedly refused to interfere. Not only so, but it is the rule now too well established in this state to be longer open to dispute, that this court will accept the findings of the trial court in equity proceedings, unless the appealing party can show that the evidence preponderates against such findings. (*Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821; *Watkins v. Watkins*, 39 Mont. 367, 102 Pac. 860; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6.) Upon the record here presented, we are unable to reach the conclusion that defendants have sustained the burden thus imposed.

Much attention is devoted in the briefs to a discussion of the question of equitable estoppel; but we are unable to understand its application upon this appeal. Upon a trial of the case on its merits, it may become an important matter, but, if we should agree with appellants that the evidence discloses an estoppel *in pais*, we are unable to see wherein it would effect the result so far as the appeal from this order is concerned. As we read the

injunction, it does not restrain defendants from dumping sawdust upon plaintiff's land, or from dumping it in substantially the same place as heretofore. It only restrains them from depositing it in the creek or upon the banks whence it would in the ordinary course of defendants' operations naturally get into the creek and upon plaintiff's placer and valley lands. But, if there is any doubt as to the meaning of the language employed in the injunction, the utmost that can be said is that defendants are enjoined from directly depositing sawdust upon plaintiff's placer ground and valley land; but in juxtaposition with the words "placer ground and valley land" the court placed the phrase "as distinguished from the hill land." So that there is not any injunction restraining defendants from dumping sawdust upon the hill land, and, as we read the evidence, the sawdust dump is upon the hill land; so that defendants cannot complain. and, by the exercise of good faith and ordinary care, they can continue their operations without fear of being adjudged in contempt. Upon the showing made, the trial court would have been justified in granting an injunction substantially in the language of this one, even though defendants' sawdust dump had been upon their own land. Certainly it cannot be claimed that, if plaintiff stood by silent and observed and permitted defendants to expend large sums of money in erecting their mill and dam upon one portion of the Ruby Placer, plaintiff would thereby be estopped to set up title to any other portion of such claim. If at the trial upon the merits it should appear that plaintiff is estopped at all, such estoppel would not go further than to preclude plaintiff from asserting title to that portion of the Ruby Placer actually occupied by defendants. Or, if it could be said that plaintiff is estopped to deny the right of defendants to maintain their sawmill or to operate it generally, it cannot be held estopped to deny the right of defendants to operate it in a particular manner, if such manner is shown to be destructive of plaintiff's rights. (*Blackford v. Heman Construction Co.*, 132 Mo. App. 157, 112 S. W. 287; *Matthews v. Stillwater Gas & El. L. Co.*, 63 Minn. 493, 65 N. W. 947; *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888.) And the reason for this rule is to be found in

the fact that it cannot be said that plaintiff, while standing by silent, if it did so, must have anticipated that defendants would operate in a particularly obnoxious manner. Certainly it cannot be said that plaintiff must have assumed that defendants would dump sawdust in the stream and thereby commit a misdemeanor under section 8797, Revised Codes; on the contrary, every fair presumption is that plaintiff anticipated that defendants would so care for the sawdust as not to commit a crime or create a nuisance.

We do not find any error in the record. The order of the district court granting the injunction is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. NORTHERN PACIFIC RAILWAY
CO., APPELLANT.

(No. 2,887.)

(Submitted September 13, 1910. Decided October 3, 1910.)

[111 Pac. 141.]

Criminal Law—Railroads—Trainmen—Hours of Labor—Violation of Statute—Circumstantial Evidence—Quantum of Proof—Presumptions—Instructions—Law of the Case—Jury must Obey.

Criminal Law—Railroads—Trainmen—Hours of Labor—Violation of Statute—Evidence—Insufficiency.

1. Evidence held insufficient to support a verdict finding the defendant railway company guilty of a violation of the provisions of sections 1741 and 1742, Revised Codes, prohibiting railroads from requiring their trainmen to work for more than sixteen consecutive hours.

Same—Circumstantial Evidence—Quantum of Proof.

2. Where circumstantial evidence is relied upon to convict of crime, the circumstances must be not only consistent with defendant's guilt, but inconsistent with any other reasonable hypothesis.

Same—Conviction—When Evidence Insufficient.

3. To sustain a conviction in a criminal prosecution, there must be some substantive testimony. Mere suspicions or probabilities, however strong, are insufficient.

Same—Presumptions—Innocence of Accused.

4. Every presumption is in favor of the innocence of one accused of crime.

Same—Instructions—Law of the Case—Jury must Obey.

5. The court's instructions to the jury are the law of the case, and a verdict in conflict therewith will, on appeal, be set aside as against law.

Appeal from District Court, Yellowstone County; Sydney Sanner, Judge.

THE NORTHERN PACIFIC RAILWAY COMPANY was convicted of requiring one of its trainmen to work for more than sixteen consecutive hours, and appeals from the judgment and an order denying it a new trial. Reversed and remanded.

There was a brief in behalf of Appellant, by *Mr. Wm. Wallace, Jr., Mr. J. G. Brown,* and *Mr. R. F. Gaines,* and oral argument by *Mr. Wallace.*

Mr. W. L. Murphy, Assistant Attorney General, argued the cause orally in behalf of the State.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Northern Pacific Railway Company was convicted of violating the provisions of sections 1741 and 1742, Revised Codes, and has appealed from the judgment and from an order denying it a new trial.

On October 9 and 10, 1909, A. P. Johnson was employed by the defendant company as a train conductor in charge of and operating an extra train, No. 109, which train was working wholly within this state and handling only local or intrastate business. The information charges that the defendant railway company did willfully, intentionally, and unlawfully order and require Johnson to labor as conductor of said train for more than sixteen consecutive hours, to-wit, from 5 P. M., on October 9, to 12:25 P. M. of October 10, and that, pursuant to said order and direction, Johnson did so work for that length of time. Some of the facts were agreed upon by counsel for the state and the railroad company, and are embodied in a written stipulation,

while the other facts were given by witnesses at the trial; but there is not any conflict whatever in the evidence, and, so far as this appeal is concerned, it may be treated as though all the facts had been agreed upon and submitted to the jury. Some of those facts are unimportant in the details, and will be stated generally. Train 109 was known as a "sugar beet train." Its business was to distribute empty freight-cars in the beet-growing territory, and pick up cars loaded with beets and take them to the sugar factory at Billings. Johnson and the other members of the train crew were called at Billings, where the train originated, for 5 P. M. on October 9. The train did not leave the Billings yards, however, until 6:15. It proceeded to Laurel, making a stop at Yegen. It arrived at Laurel at 8:16 P. M., and, while still there, and at about 9:20 P. M., Johnson received an order to work his train until 6 A. M. of October 10 between Laurel, Boyd, and Bridger. Pursuant to this order, Johnson took his train to Silesia; thence over the Clark's Fork branch to Bridger, where he arrived at 12:01 October 10, and, completing his work over that branch, returned to Silesia at 3 A. M., where he received an order at 3:40 A. M. to work between Silesia and Boyd until 8 A. M. Pursuant to this order, Johnson worked his train to Boyd and back as far as Joliet, where at 7:40 A. M. he received train order No. 223, as follows: "Engine 109 will run extra Joliet to Laurel, meet extra 401 west at Silesia." October 10, 1909, was Sunday. The telegraph operator at Joliet was not required to be on duty on Sunday except to meet passenger trains. While the evidence is meager, it appears that upon receipt of order 223 above Johnson ran his train by the depot at Joliet, and the operator there reported to the dispatcher that 109 left Joliet at 7:53 A. M. After making this report, the Joliet operator apparently went off duty at once. From Joliet to Laurel is 17.6 miles; from Joliet to Silesia, eight miles. The report which the Joliet operator made to the dispatcher was erroneous. Instead of proceeding to Silesia, Johnson moved his train to the east switch at Joliet, then backed it on the siding there and remained until 9:25 A. M., when he proceeded to Silesia, where he arrived at 10 A. M., and in taking the siding there the bottom of one car of his train

gave way, precipitating a load of beets on the track. Johnson went to the office of the operator at Silesia to report this accident to the division superintendent, and, while in the office making his report, he received from the dispatcher an order tying up his train, and relieving the crew from further work at that time. In order to get his train off the main track, Johnson secured the services of sectionmen, removed the sugar beets from the track, then put his train on the siding, and at 12:25 P. M. he and the remainder of the crew went off duty.

At the close of the evidence, counsel for the defendant railway company moved the court to direct a verdict in favor of defendant, on the ground that the evidence is insufficient to justify a verdict of guilty. The motion was denied. One ground of the motion for a new trial is: "The verdict is contrary to law." Of the errors specified by counsel for appellant, it will be necessary to consider only those arising from the order of the court refusing to direct a verdict, and its refusal to grant a new trial upon the ground specified above.

In order to make out a case, it was incumbent upon the state to prove beyond a reasonable doubt that the railway company ordered or required Johnson to labor more than sixteen consecutive hours. Whether the phrase "be on duty," as used in section 1741 above, was intended by the legislature as synonymous with the word "work," we need not now stop to consider. Counting from 5 P. M. of October 9, the time when Johnson reported for duty, the period of sixteen consecutive hours during which he might lawfully labor under orders or directions from the railway company would expire at 9 A. M. October 10. So far as this record discloses, the only orders or directions which Johnson had or received were those from the dispatcher referred to above, and, for the purposes of this case, the dispatcher was the railway company. Briefly reviewed, those orders are: (1) Go from Billings to Yegen; (2) go from Yegen to Great Northern Junction; (3) proceed to Laurel; (4) work between Laurel, Boyd, and Bridger until 6 A. M. October 10; (5) work between Silesia and Boyd until 8 A. M. October 10; (6) run from Joliet to Laurel. There

is not any time limit in any one of the first three orders above. But in view of the fact that they were delivered to Johnson soon after he went on duty, and that he made the run from Billings to Laurel in three hours and six minutes, including stops, and that the distance is only 18.6 miles, there cannot be any inference drawn from any, or all three, of those orders that the railway company ordered or directed or intended Johnson to work for more than sixteen hours in getting from Billings to Laurel. The fourth order above was given at 9:17 P. M. October 9, and it not only does not direct Johnson to work beyond 9 A. M. of October 10, but specifically limits the time for his work to 6 A. M. The fifth order was given at Silesia at 3:40 A. M., and it likewise specifically limits the time of work in this instance to 8 A. M. So that it is impossible to draw any inference of guilt from either or both of these two orders. The only other order or direction given to Johnson is contained in train order 223, quoted above, which was delivered to him at 7:40 A. M. on October 10 at Joliet. And if any inference of guilt whatever is to be deduced from the evidence, taken as a whole, it must be found in this order 223, considered in the light of surrounding circumstances. Order 223 merely directs Johnson to proceed from Joliet to Silesia, meet train 401, and then proceed to Laurel. There is not any time limit mentioned within which this work should be done. The running time between Joliet and Laurel is not given in the evidence. The distance from Joliet to Silesia is eight miles, and the running time forty minutes. The distance from Silesia to Laurel is 9.6 miles. At 7:40 A. M. on October 10, when Johnson received order 223, he had one hour and twenty minutes to run from Joliet to Silesia, meet train 401, and get to Laurel by 9 o'clock, the time when his sixteen consecutive hours of labor would expire, counting directly from 5 P. M. of October 9. Whether or not this period of one hour and twenty minutes was sufficient within which to do what Johnson was so ordered to do, whether or not train 401 would be at Silesia by the time 109 would reach there in the ordinary course of its running, or, if not, for what length of time train 109 would have to wait at

Silesia—are all matters upon which the record is absolutely silent.

Since order 223 does not of itself furnish evidence of a criminal intent on the part of the railway company, and there is not any other direct evidence, the state was forced to rely upon circumstantial evidence to show such willful purpose or criminal intent. Can it be said, then, that in issuing order 223 the railway company knew that Johnson could not do the work required by the order to be done, and complete it by 9 o'clock A. M., or that such order was given with a reckless disregard as to whether or not it would require Johnson to remain at work beyond that hour? We are at a loss to know how either inference can be drawn from the evidence to which reference has been made, and to spell out either inference can only be done, if at all, by marshaling all the presumptions arising from the evidence, in favor of defendant's guilt. When a corporation is charged with a violation of a penal statute, it occupies precisely the same situation that a natural person does. It is presumed innocent until proven guilty. The state must establish its guilt by evidence showing such fact beyond a reasonable doubt; and, where circumstantial evidence is relied upon to establish guilt, the circumstances must be not only consistent with the idea of defendant's guilt, but inconsistent with any other reasonable hypothesis. Such is the rule in this state, and generally recognized as correct. (*State v. Allen*, 34 Mont. 403, 87 Pac. 177.) From the fact that after receiving order 223, and before any countermanding order was given him, Johnson did actually work until after 9 A. M. of October 10, there might appear at first blush some inference of guilt on the part of the railway company, if the circumstances stood alone and unexplained. However, there are some additional facts disclosed by the record which bear upon this subject. At the time (7:40 A. M. October 10) when Johnson received order 223 to proceed from Joliet to Laurel, meeting train 401 at Silesia, he had one hour and twenty minutes remaining of his sixteen hours of labor. He had less than eighteen miles to run with thirty-four loads, and his train was then ready to start, so

far as we know from the record. He actually pulled his train by the depot at Joliet, and the operator there, apparently believing he was starting on his journey pursuant to order 223, reported to the dispatcher that he had actually left Joliet with his train at 7:53 A. M. This report was entered on the train-sheet in the dispatcher's office. Instead, however, of continuing his journey to Silesia, as ordered, Johnson backed his train on the siding at Joliet and waited for one hour and thirty-five minutes, and the only explanation found in the record for his doing so is his statement that he was waiting for train 29, a train not mentioned in the order, and the arriving time of which at Joliet is not given. At 8 A. M. the dispatcher who gave order 223 and received the report from the Joliet operator and made the entry on the train-sheet went off duty, and a new dispatcher assumed his place. The new dispatcher, finding that Johnson's train was reported out of Joliet at 7:53, assumed that it would reach Silesia at 8:33, forty minutes being its running time. As the train did not appear at Silesia on time, and as the dispatcher was not able to get the operator at Joliet from 8 A. M. until 10 A. M., he did not know, and was apparently unable to ascertain, where Johnson and his train were during that period, or until Johnson finally arrived at Silesia and reported the accident to his train at that place, when he was immediately relieved. Whether Johnson's reason for holding his train at Joliet was a valid one or not does not appear, and it does not concern us; but by what process of reasoning it can be said that the order to him to proceed from Joliet to Silesia, given at 7:40 A. M., authorized or directed him to wait one hour and thirty-five minutes at Joliet and then proceed, we are unable to understand or appreciate. It cannot be said that there is a presumption that the railway company intended to violate the law. Every presumption is in favor of the innocence of anyone accused of crime. So far as we know from the evidence, there was ample time for Johnson to make the run from Joliet to Laurel after he received order 223 and before 9 A. M. The distance was but 17.6 miles, and he had one hour and twenty minutes within which to make the run. At least, it

must be considered a fair presumption that the time was ample for him to run from Joliet to Silesia, a distance of only eight miles, where his train could have been tied up and he relieved from further duty if it then became apparent that he could not complete the run to Laurel before the expiration of his sixteen hours of continuous labor. It does appear affirmatively that the railway company did not have any opportunity to control his movements after 8 A. M. and before 10 A. M., and, in order to convict the defendant, the prosecution must show that in working after 9 o'clock on October 10 Johnson did so, not voluntarily, but by order or direction of the railway company, and in this, we think, it has failed entirely.

The state has not furnished any brief in this case; but we have searched the record, and have been unable to find any evidence indicative of guilt. In *State v. McCarthy*, 36 Mont. 226, 92 Pac. 521, this court said: "There must be some substantive testimony to justify the judgment of a court. Mere suspicions or probabilities, however strong, are not sufficient basis for a conviction of crime." This was approved in *State v. Duncan*, 40 Mont. 531, 107 Pac. 510.

2. The court gave instruction No. 5b, as follows: "It is alleged in the information in this case that the defendant railway ordered A. P. Johnson to work and labor for more than sixteen consecutive hours. It is not enough that the proof should show beyond a reasonable doubt that said A. P. Johnson did so in fact labor, but it must appear beyond a reasonable doubt that the orders given him by the defendant railway company required him to so work and be on duty for the full period as charged in the information, and, if this is not proven, your verdict must be for the defendant." This instruction became the law of the case, binding upon the jury, and a verdict in conflict with it will be set aside as against law. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057.) When we consider the evidence as a whole, it seems impossible that the jury could have reached the verdict which was returned, except upon the theory that the railway company was responsible for any work which Johnson did after 9 A. M. of October 10, whether it ordered or directed such

work or not, a theory directly conflicting with the instruction quoted above.

The judgment and order of the district court are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

CONSOLIDATED GOLD AND SAPPHIRE MINING CO., RE-
SPONDENT, v. STRUTHERS ET AL., APPELLANTS.

(No. 2,850.)

(Submitted September 13, 1910. Decided October 3, 1910.)

[111 Pac. 152.]

*Mining Claims—Ejectment—Verdict—Sufficiency—Judgment—
Declaratory Statements—Evidence—Harmless Error.*

Trial—Verdict—Sufficiency—How to be Construed.

1. A verdict should be given such a reasonable construction as will carry out the obvious intention of the jury; and, in arriving at such intention, reference may be had to the issues made by the pleadings, the instructions to the jury, and the evidence introduced at the trial.

Ejectment—Verdict—Sufficiency.

2. In an action in ejectment to recover possession of a portion of a mining claim, the complaint in which described the whole claim as well as the parcel in dispute, *held* that the verdict in favor of plaintiff "for the restitution of the premises described in the complaint" was not fatally defective as awarding restitution of the whole claim, since, under the rule stated in paragraph 1 above, the jury must have understood that they were only concerned with the portion in controversy, and had nothing to do with the claim as a whole.

Judgment in Excess of Verdict—Modification.

3. Where the judgment in an action at law awards a larger measure of relief than is warranted by the verdict, it will be modified on appeal to conform to the verdict, a new trial not being necessary for that purpose.

Ejectment—Issues—Withdrawal from Jury—Decision by Court—Verdict—Sufficiency.

4. Where the court in an action in ejectment instructed the jury that the evidence conclusively established title and right of possession of plaintiff, and that they should find in its favor for the restitution of the premises, and for such damages as the evidence showed plaintiff to have suffered, thus virtually, though not formally, withdrawing from the jury the issues of ownership, right of possession and ouster, and no

complaint having been made that the evidence was not sufficient to authorize a directed verdict as to the issues thus withdrawn, a verdict in accordance with the instruction was not fatally defective for failing to also find upon the issues thus withdrawn.

Same—Mining Claims—Declaratory Statements—Defects—Who may not Take Advantage of.

5. Defendants in ejectment who had made no attempt to show title in themselves to the portion of a mining claim in dispute, by location or any other method provided for by the federal statute, were not in position to take advantage of an alleged defect in a declaratory statement, section 2293, Revised Codes, providing that defects in notices or certificates shall not be deemed material "except as against one who has located the same ground, or some portion thereof, in good faith and without notice."

Same—Title—Pleading—Proof.

6. In ejectment, the plaintiff is not required to deraign his title in his complaint; under the allegation of ownership, he may prove such title as he has, from whatever source acquired, and by any species of conveyance recognized by law.

Same—Certificates—When not *Prima Facie* Evidence of Title.

7. Though it was error to admit a receipt issued by the receiver of the United States land office showing that plaintiff in an action in ejectment had paid money to that officer "in connection" with the purchase of the mining claim in controversy, but not disclosing that plaintiff had made the purchase or was entitled to patent, and was therefore not such a certificate as is referred to in section 7931, Revised Codes, as being *prima facie* evidence of title, it was error without prejudice, plaintiff's title having been amply established by other proof.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by the Consolidated Gold and Sapphire Mining Company against A. D. Struthers and another. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Remanded, with directions.

On behalf of Appellants, there was a brief by *Messrs. Rodgers & Rodgers*, and *Mr. John Lindsay*, and oral agreement by *Mr. W. B. Rodgers*.

The verdict did not authorize nor support the entry of the judgment entered in this action against the defendants, or the entry of any judgment against the defendants, for the reason that the verdict did not find or decide as to any of the material issues in the case, or upon all or any of the material issues made by the pleadings. (*Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75; *Throckmorton v. Davenport*, 55 Tex. 236; *Miles v. Skinner*, 42 Mich. 181, 3 N. W. 918; *Lazarus v. Barrett*, 5 Tex. Civ. 5, 23

S. W. 822; *Burnett v. Harrington*, 58 Tex. 359; *Teasdale v. Manchester Produce Co.*, 104 Tenn. 267, 56 S. W. 853; *Parsley v. Nicholson*, 65 N. C. 207; *Caldwell v. Stephens*, 57 Mo. 589.)

The court erred in admitting the purported receipt from the land office in evidence. It was no more than a preliminary receipt, and showed no more than a note or memorandum, made by the officers of the land office, would show in a case where money had been deposited subject to acceptance or rejection, as the case might be, by the local land office upon the final determination of the fact as to whether or not an entry should be allowed. If it should be held, however, that the receipt was a final receipt, which it was not, and could not be, yet it would not be sufficient to support an action in ejectment. (See *Fenn v. Holme*, 21 How. (U. S.) 481, 16 L. Ed. 198; *Hooper v. Scheimer*, 23 How. (U. S.) 235, 16 L. Ed. 452; *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. Ed. 344.)

In behalf of Respondent, *Messrs. Kirk, Bourquin & Kirk*, and *Mr. C. N. Davidson*, submitted a brief. *Mr. George M. Bourquin* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Ejectment. This action was brought by plaintiff to recover possession of a portion of the Ruby First placer mining claim. The claim is described as follows: "Lot 11, Sec. 7, W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, Sec. 8, T. 5 N. R. 8 W." The area in controversy is described as "that portion thereof situated in the S. W. $\frac{1}{4}$ of said section 8." The complaint is in the usual form, alleging ownership and right of possession in the plaintiff, ouster by the defendants, and general damages for the wrongful withholding by defendants. It is also alleged, by way of special damages, that the defendants have cut and removed from the ground in controversy the growing timber which stood thereon. The answer admits that defendants are in possession of the ground

in controversy as alleged, and that they have cut and removed the timber therefrom, but denies all the other allegations of the complaint. It alleges that defendants are in possession, and entitled to the possession as owners in fee. At the trial the plaintiff was permitted, over objection by defendants, to introduce, in support of its claim of title, the original declaratory statement of the location of the Ruby 1 placer claim, covering the ground in controversy, by one Scanlan and twelve others, conveyances by all of them to the plaintiff, an amended declaratory statement of a location made on behalf of the plaintiff by one Barker as its agent, covering the same ground under the name of "Ruby First Placer," and what is referred to in the record as a "receiver's final receipt and certificate of purchase" from the United States. The material part of the latter is as follows:

"Department of the Interior,

"General Land Office.

"No. 79,020.

"Receipt.

"U. S. Land Office, Helena, Mont.

"Oct. 28, 1908.

"Received of Consolidated Gold & Sapphire Mining Co. by Nat Simon, att'y-in-fact, Butte, Mont., the sum of two hundred and thirty-seven dollars and 50 cents, in connection with mineral application to purchase, serial No. 0-260, for Lot 11," etc.

The foregoing documents were introduced in order the reverse of that in which they are enumerated, but no contention is now made that there was error in that behalf.

At the close of the evidence, the court directed the jury to find for the plaintiff for the restitution of the ground in controversy, submitting to them the question of the amount of damages only. The first paragraph of the charge is the following: "The plaintiff is conclusively proven to be the owner of, and is entitled to, the possession of the premises in controversy, and you will find your verdict for it for restitution of the premises and such damages, if any, as you may find from the evidence it has suffered by the acts of the defendants in taking possession of and occupying the

premises, building a dam, and cutting trees thereon. Defendants admit these acts, and so are liable in damages, if any were caused thereby."

The jury returned their verdict as follows: "We, the jury in the above-entitled cause, find our verdict for the plaintiff for the restitution of the premises described in the complaint, and for damages in the sum of \$1,000." The judgment entered upon this verdict, instead of awarding to the plaintiff recovery of only that portion of the claim from which plaintiff alleges it was ousted, awards recovery of the entire claim. The defendants have appealed from the judgment and an order denying their motion for a new trial.

1. The defendants' first contention is that the verdict is fatally defective, in that it finds that plaintiff should have restitution of that portion of the Ruby First placer claim which is not in any way involved in controversy. This contention is without merit. A verdict is not to be technically construed, but is to be given such a reasonable construction as will carry out the obvious intention of the jury. In arriving at this intention, reference may be had to the issues made by the pleadings, the instructions submitted by the court, and the evidence introduced at the trial; and if by a fair and reasonable construction of it, in view of the whole record, the intention of the jury is manifest it should be allowed to stand. Applying this rule to the verdict in this case, it is clearly sufficient. It is true that, standing alone, it may be construed to award restitution of the whole of the Ruby First placer claim, yet, by reference to the complaint, we find that the portion in controversy is specifically described. The instruction refers definitely to the "premises in controversy." The jury could not have understood that they had anything to do with the undisputed portion, and, in the light of these clear references, we must conclude that the indefinite mention of the premises described in the complaint refers to the disputed portion as there described. The maxim, "*Id certum est quod certum reddi potest*," applies. (29 Am. & Eng. Ency. of Law, 2d ed., 1018.) In any event, as we shall point out hereafter, this finding by the jury was wholly immaterial.

It is obvious, however, that the judgment is erroneous in so far as it undertakes to adjudicate the title to the undisputed portion and award restitution thereof. "A judgment is the final determination of the rights of the parties in an action or proceeding." (Revised Codes, sec. 6710.) While, when there is appearance and answer by the defendant, any relief may be awarded which is consistent with the complaint and embraced within the issues (Revised Codes, sec. 6713; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519), yet it is elementary that the award may not extend further in any case. And, when the trial is by a jury, the judgment must be entered in conformity with the verdict. (Revised Codes, sec. 6800.) But the defendants are not entitled to a new trial because of this error. A modification of the judgment so as to make it conform to the verdict is the full measure of relief to which they are entitled, and a new trial is not necessary for this purpose.

2. The second contention is that the verdict is fatally defective, in that it fails to find upon the issues of ownership and right of possession. It will be noted that the court in the instruction quoted stated to the jury that the evidence conclusively establishes title and right of possession in plaintiff, and that they should find in its favor for the restitution of the premises in controversy, and for such damages as the evidence shows it had suffered by the ouster and possession by the defendants. There is no complaint that the evidence is not sufficient to authorize a directed verdict as to all the issues except that of damages. The instruction in effect withdrew from the jury the issues of ownership, right of possession and ouster, and submitted the question of damages only; for, though the jury were told that they should find for the plaintiff for a restitution, in addition to the amount of damages, if any, which plaintiff had suffered, the right to have restitution involved no issue of fact, but followed as a legal conclusion from a determination of the other issues by the court upon uncontroverted evidence. The conclusion that the plaintiff was entitled to restitution was therefore to be declared by the court, and not by the jury. It is the general rule that the verdict must respond to all the material issues, or the result is a mistrial.

(*Hamilton v. Murray*, 29 Mont. 80, 74 Pac. 75.) But the court is never required to take the opinion of the jury upon issues which have been removed from the controversy by the admissions of the parties or which are established by uncontroverted evidence; and hence the formal verdict is sufficient if it responds to all the issues properly submitted.

But counsel for defendants argue that in this character of case (one at law), where issues of fact are made by the pleadings, the parties are entitled to a jury trial as a constitutional right; that this right is in no way affected by the amount of evidence the defendant may be able to introduce in support of his claim; that, if he fails to introduce any evidence, he is nevertheless entitled to a verdict by a jury responding to all the issues made by the pleadings; and that, though the case upon the evidence as to any issue presents a question of law only, the court has no power to withdraw such issue from the jury and submit only the controverted issues. In other words, though, under the statute (Revised Codes, sec. 6761), the court may direct a verdict in a particular way, when questions of law only are presented, the parties are entitled to have a formal verdict upon all the issues made by the pleadings. It follows, therefore, counsel say, that, since the court did not require the jury to render a general verdict upon all the issues, the defendants are entitled, under the constitutional guaranty, to have the judgment set aside and a new trial ordered. In support of this contention they cite *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, and *Baylis v. Travelers' Ins. Co.*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989.

This court has repeatedly held that the right guaranteed by the state Constitution (Article III, sec. 23) is the same as that guaranteed by the federal Constitution (Seventh Amendment), because the federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state, and the right as it then existed was preserved in the state Constitution. (*Kleinschmidt v. Dunphy*, 1 Mont. 118; *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589; *Montana Ore Pur. Co. v. Boston & Mont. C. C. & S. Min. Co.*, 27 Mont. 536, 71 Pac.

1005; *Chessman v. Hale*, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038.) Of course, the parties may waive the right and submit their controversy to the court; but this may be done only in the mode prescribed by law. (Constitution, Art. III, sec. 23; Revised Codes, sec. 6762; *Chessman v. Hale*, *supra*.) Otherwise the judge has no power to substitute himself in the place of the jury. This right has always been jealously guarded. (*Chessman v. Hale*, *supra*; *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169; *Baylis v. Travelers' Ins. Co.*, 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989; *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99.) Under section 250, Division 1, Compiled Statutes of 1887, the parties were entitled to a trial by jury of the issues of fact in actions for the recovery of real property; and this is to say that, whenever in a given case the evidence is such that reasonable men may disagree as to the proper inference to be drawn from it, it must have been submitted to the jury. The jury, and not the court, must weigh and decide. But it has always been the practice in this jurisdiction that, when the evidence on the part of the plaintiff does not tend to establish the cause of action stated in the complaint, the court may direct a verdict or take the case from the jury and enter a judgment of nonsuit. In such case there is nothing for the jury to find. (Compiled Statutes, 1887, Div. I, sec. 242; Revised Codes, sec. 6714; *Garver v. Lynde*, 7 Mont. 108, 14 Pac. 697; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999.) Whether the court pursues one course or the other, the result is the same; for, though the court directs the return of a formal verdict, the result is nothing more than a determination of the case by the court; the jury performing no other office than that of giving form to the court's conclusion. (*McKay v. Montana Union Ry. Co.*, *supra*.) So, too, whenever the defendant has failed to make proof of his defense, but has left the plaintiff's case, as shown by his evidence, uncontroverted, and this stands unimpeached so that but one inference may be drawn from it, and that favorable to the plaintiff, it has been the practice for the court to direct a verdict for the plaintiff.

This course was pursued in *Mayer v. Carothers*, 14 Mont. 274, 36 Pac. 182, and was recognized as the proper rule of practice in *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969, and *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99. When a case is in this condition, it is stripped of questions of fact, and presents only a question of law for decision by the court. (*Helena Nat. Bank v. Rocky Mt. Bell Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Emerson v. Eldorado Ditch Co.*, *supra*; *Murray v. Hauser*, *supra*; *Dunseth v. Butte Electric Ry. Co.*, *ante*, p. 14, 108 Pac. 567.) Under the practice, then, recognized and followed in these cases, it is not important whether the court directs the jury to render a verdict for either party, or discharges the jury and renders judgment. In either case the result is the decision of the court.

The statute (Revised Codes, sec. 6761) provides that, when the case presents only questions of law, the judge may direct the jury to render a verdict in favor of the party entitled thereto. But, since the decision is in any event that of the court, it cannot prejudice the rights of the parties if the formal procedure prescribed is not pursued. If the court pursues the latter course, it is at most a mere irregularity, which this court may not take notice of. (Revised Codes, sec. 6593.) The right of the plaintiff and defendant to a jury trial upon issues of fact stands upon the same footing. If the pleadings present such issues, *prima facie* each is entitled to have a jury determine them; but, if during the course of the trial it becomes apparent that there are no such issues in the evidence, the decision falls within the province of the court. In view of the cases cited, we are justified in concluding that this has always been understood, both by the profession and the courts in this state, to be the meaning of section 6724 of the Revised Codes, which is substantially the same as the provision contained in the Bannack Statutes, enacted by the first territorial legislature in 1864 (Bannack Statutes, p. 68, sec. 127). The rule of practice contended for by counsel, strictly applied as it was in *Hodges v. Easton* and *Baylis v. Insurance Co.*, *supra*, was never followed by the courts of the territory, nor has it been

recognized by our state courts. Indeed, to reverse a judgment in any case on the ground that the trial court has failed formally to direct a verdict, the condition of the evidence permitting it would be absurdly technical.

It was said in *Murray v. Hauser, supra*, that the practice in this state touching the methods by which the court may upon trial dispose of actions at law is somewhat more liberal than the practice prevailing in the federal courts. This statement is justified by the cases which we have cited. In the case before us, the court virtually, though not formally, withdrew all the issues from the consideration of the jury, except the issue made as to the amount of damages. If there had been no such issue in the case, the court would have been justified in directing a verdict upon the whole case. The instruction in effect submitted to the jury a special finding as to the amount of damages, and, upon entering judgment, the judge decided all the other questions in the case. This, we think, while not strictly in accord with the statute, was well within the province of the court, and the judgment should not be reversed because the statute was not strictly pursued.

A different rule applies in criminal cases. The trial court may never direct a verdict for the state; for, though the defendant may introduce no evidence at all, it is for the jury to say whether the evidence introduced by the state has overcome the presumption of innocence which the law indulges in favor of the defendant, and has established his guilt beyond a reasonable doubt. (*State v. Koch*, 33 Mont. 490, 85 Pac. 272, 8 Ann. Cas. 804.)

3. Error is alleged upon the action of the court in overruling the objection of defendants to the admission in evidence of the original and amended declaratory statements of location of the Ruby placer mining claim, and the receipt of the receiver of the United States land office. To the declaratory statements it was objected that they do not comply, in several particulars, with the requirements of the statutes of Montana. The defendants are not in a position, however, to take advantage of these defects, if in fact they are such. The original location of the claim was completed January 30, 1892. The amended location was com-

pleted on March 26, 1906. Both fully comply with the requirements of the federal statute. The legislation prescribing the requirements to be observed by the locator of a mining claim at the time the second declaratory statement was recorded (Political Code 1895, secs. 3610–3616) was amended in several substantial particulars by the Act of 1907 (Revised Codes, secs. 2283–2296). Among other provisions embodied in the latter, it is provided “that no defect in the posted notice or recorded certificate shall be deemed material except as against one who has located the same ground, or some portion thereof, in good faith and without notice.” The defendants did not attempt to show title in themselves by location or any other method provided for by the federal statute.

Touching the receiver’s receipt, it was objected that it was immaterial and irrelevant, because the plaintiff in its complaint does not deraign title from the United States in any other way than by location. In the brief, contention is made that the paper, though designated as a final receipt, upon its face evidences nothing further than an offer to purchase by the plaintiff, and is not a muniment of title, such as the certificate of purchase usually issued to purchasers by the United States land department upon final entry. The objection urged at the trial was, of course, not maintainable. In ejectment, the plaintiff is not required to deraign his title in his complaint. Under the allegation of ownership, he may prove such title as he has from whatever source he may have acquired it, and by any species of conveyance which is recognized by law. Here the allegation is of ownership and right of possession. The receipt, though showing that the plaintiff had paid money to the receiver “in connection” with the purchase of the claim, does not certify that it had purchased it or is entitled to patent. It is therefore not such a certificate as is referred to in section 7931, Revised Codes, as *prima facie* evidence of title. It was wholly valueless as evidence, and should have been excluded upon proper objection. But its admission wrought no prejudice, since the alleged declaratory statements furnish ample proof of plaintiff’s title.

Other contentions are made, but we find no merit in them. The cause is remanded to the district court, with directions to set aside the judgment, and to cause one to be entered in conformity with the views herein expressed. Appellants pay the costs of this appeal.

Modified.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
OCTOBER TERM, 1910.

The HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH, }
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

STATE EX REL. DRIFFILL, RESPONDENT, v. CITY OF ANA-
CONDA ET AL., APPELLANTS.

(No. 2,854.)

(Submitted September 14, 1910. Decided October 11, 1910.)

[111 Pac. 345.]

*Cities and Towns—Fire Department—Civil Service Statute—
Unlawful Removal of Firemen—Reinstatement—Mandamus—
Complaint—Sufficiency.*

Mandamus—Firemen—Reinstatement.

1. *Mandamus* lies to reinstate a fireman who has been discharged in violation of the Act placing paid fire departments under civil service rules. (Revised Codes, secs. 3326 *et seq.*)

Fire Department—Unlawful Discharge of Member—*Mandamus*—Complaint—Sufficiency.

2. The statement of plaintiff, a discharged fireman, in his affidavit for writ of mandate to compel his reinstatement, that he had been duly appointed and confirmed as a member of the fire department, and that at all times he had the physical ability to perform his duties as such, was a sufficient allegation that he possessed the qualifications of a fireman as defined in section 3330, Revised Codes.

Same—Power of Council.

3. Since a fireman is not to be deemed a municipal officer (Revised Codes, sec. 3327), section 3220, providing that the city council may dis-

charge "any officer" whose appointment is made by the mayor, with the advice and consent of the council, has no application to him.

Waiver—What Constitutes.

4. The term "waiver" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; hence, there cannot be a waiver, unless at the time it is alleged to have been exercised, the right or privilege to be waived was in existence.

Fire Department—Removal of Member—Charges in Writing—Waiver.

5. Plaintiff was removed from his position as a paid fireman, without any charges having been preferred, a hearing had and the accused found guilty, as prescribed by section 3328, Revised Codes. He subsequently petitioned the city council for reinstatement. *Held*, under the rule declared in paragraph 4 above, that plaintiff's action in asking for reinstatement after his discharge did not constitute a waiver of his right to be confronted with written charges as one of the conditions precedent to his removal.

Same—Reduction in Force—Discretion.

6. Under section 3329, Revised Codes, the city council must, if it deems it necessary to reduce the number of paid firemen, retire the one last appointed, and may not exercise any discretion in the premises and discharge the one thought least efficient, even though oldest in point of service.

Same—Unlawful Removal of Member—Economy—When No Defense.

7. A city which, having reached the constitutional limit of indebtedness, finds itself in financial straits, will not be heard to say, in defense of its violation of a civil service statute in removing a fireman contrary to its provisions, that it did so to reduce expenses, where it has failed to take advantage of the Act (Revised Codes, secs. 3287, 3288) authorizing cities in such condition to pay their running expenses from current revenues upon a cash basis.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

MANDAMUS by the state, on the relation of Harry G. Driffill against the city of Anaconda and others. From a judgment for relator and from an order refusing a new trial, defendants appeal. Affirmed.

Mr. T. O'Leary, in behalf of Appellants, submitted a brief and argued the cause orally.

Mr. T. P. Stewart submitted a brief in behalf of Respondent, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

For several years last past the city of Anaconda has had a regularly organized paid fire department. On June 6, 1907, this

relator was appointed a member of the department on probation, conformably with the provisions of section 3327, Revised Codes, and served on probation until June 1, 1908, when he was appointed and confirmed and became a regular member of the force and served as such until June 18, 1909. On June 14, 1909, the city of Anaconda had reached the constitutional limit of indebtedness, and it became necessary for the city officers to devise means to reduce the current expenses. To that end, the city council determined to reduce the number of paid firemen, and the chief of the fire department was instructed to retire one member. On June 18, 1909, the fire chief notified relator that he, relator, was dropped from the roll of paid firemen, and over the objection and against the protest of relator he was dropped. Some time after being thus retired, relator petitioned the city council to reinstate him. A hearing was had upon the petition, and the council approved the action of the fire chief, and, notwithstanding relator reported for duty, he was denied work in the department. These facts are set forth more in detail in the affidavit which the relator presented to the district court for a writ of mandate to secure his reinstatement. It is also alleged in the affidavit that at all times the relator has been physically able to discharge the duties of a fireman. The relative rank of the members of the fire department at the time the relator was retired, based upon seniority of service, is given as follows: "Mentrum, Ecklund, Driffill, Mitchell, Grierson, Fisher, Hees, Lovell and Falk." And it is alleged that of these members only Mentrum and Ecklund were members of the department at the time relator was appointed; that Mitchell was appointed on probation in August, 1907, and appointed and confirmed a member of the department on June 1, 1908; and that the last five named members are all serving on probation, and all have been appointed since May 1, 1908.

An alternative writ of mandate was issued and served, and upon the return, the several defendants presented a joint general demurrer, which was overruled. Two separate answers were then filed, one by the mayor on behalf of himself, the city and the councilmen, and the other by the chief of the fire department.

The answer of the mayor recites the history of the city's financial difficulties, and the method pursued by the city to reduce its expenses. It is then alleged that this relator was retired from the fire department because his services could best be dispensed with and the efficiency of the force maintained. The answer of the chief of the fire department sets forth substantially the same facts as are contained in the answer of the mayor, and then alleges that relator had been insubordinate in the department, had neglected his duties, and had habitually used profane and indecent language about the fire station, in violation of an ordinance of the city, that these matters were called to the attention of relator at the time of his retirement, and that the latter admitted the facts to be true, and then and there waived the preferment of charges against him. The proceeding was brought to trial before the court sitting without a jury. At the conclusion of the hearing, the court made a general finding in favor of the relator, and judgment was rendered and entered thereon, from which judgment and an order denying a new trial defendants have appealed.

1. It is urged that the demurrer to the affidavit and alternative writ should have been sustained. (a) It is said that *mandamus* is not an available remedy, but that resort should have been had to *quo warranto* proceedings, and *People ex rel. Lazarus v. Sheehan*, 128 App. Div. 743, 113 N. Y. Supp. 230, is cited to the effect that "one wrongfully removed from an official position in a city fire department cannot compel the board of fire commissioners by *mandamus* to restore him to the position, or one of a similar grade, unless such a position is vacant." Assuming that this is a correct statement of the law as applied to the case of one seeking reinstatement in a particular office, it does not have any application in this case. Section 3327, Revised Codes, provides: "The chief of the fire department and the assistant chief of the fire department and the firemen shall not be deemed officers of the municipal corporation in which such fire department is established." Under this statute, firemen are servants or employees of the city, but are not officers. The statute, however, is a civil service law, and does secure to every paid fireman a right to his

position; and section 7214, Revised Codes, provides that the writ of mandate may be issued to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled and from which he is unlawfully precluded. "*Mandamus* lies to reinstate an officer or employee who has been discharged in violation of the civil service laws." (26 Cyc. 260, and cases cited.)

(b) It is urged that the relator does not state that he possesses the qualifications of a fireman as defined in section 3330, Revised Codes. But his affidavit does state that the relator was duly appointed and confirmed as a member of the Anaconda fire department; and section 3327, above, provides that, when he is so appointed, he shall hold his position during good behavior, unless incapacitated by physical debility to perform his duties, and relator alleges that at all times he has had the physical ability to perform his duties as a member of the fire department. When we recall that the statute provides that it shall be presumed that official duty has been regularly performed, it seems a fair inference from the allegations of the affidavit that relator possessed the necessary qualifications; otherwise he would not have been appointed in the first instance.

(c) It is urged that the city of Anaconda is not a necessary or proper party to this proceeding, and assuming, without deciding, that this is correct, still it does not alter the position of any one of the parties to his prejudice to permit the judgment to stand as against all.

2. It is suggested that the city council might have dropped the relator from the roll of firemen by virtue of the provisions of section 3220 of the Revised Codes; but that section deals only with city officers, while the relator was not such an officer. (Section 3327, above.)

3. In order to dispense with the services of the relator against his will, it was incumbent upon the city to pursue the mode prescribed by section 3328 or section 3329, Revised Codes. Section 3328 is a disciplinary measure. It provides for the removal of a fireman for cause; but, as a condition precedent to such removal, charges in writing must be preferred to the council, a hearing

had, and the accused found guilty. In this instance there never were any charges in writing preferred against the relator. But it is urged that, by petitioning the city council for reinstatement, the relator thereby waived his right to have the charges preferred in writing, and at least tacitly consented that oral charges against him might be heard upon consideration of his petition. At the time relator petitioned the city council for reinstatement, he had already been removed from his position as a member of the department, and, this being true, it would seem that the doctrine of waiver cannot have any application here. "A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057; 29 Am. & Eng. Ency. of Law, 2d ed., 1091.) It is elementary that there cannot be a waiver, unless at the time it is exercised the right or privilege to be waived was in existence. In *San Bernardino I. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487, it is said: "The term 'waiver' or 'to waive' implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; and there can be no waiver unless at the time of its exercise the right or privilege waived is in existence. There can be no waiver of a right that has been lost. 'Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted upon.' "

It is alleged by relator, and not denied by defendants, that the relator was removed without any opportunity afforded him to be heard at all. How, then, can it be said that by asking for reinstatement he waived his right to be confronted by written charges as a condition precedent to his removal? Counsel for appellants in his brief says: "But we contend that section 3328 has no bearing on this case." If this statement is correct, then it is altogether immaterial whether relator did or did not waive his right to have the charges preferred in writing, if any such right he had at the time. But, if it be said that the allegation in the return of the fire chief that at the time of the relator's removal he waived his right to have charges preferred in writing,

is a sufficient plea of waiver, it became immaterial when the defendants failed to furnish evidence sufficient to support it.

4. It is contended that the city council has the right to reduce the number of paid firemen without any charges of any character having been preferred. This right is conceded by relator. It is clearly inferable from section 3329, above, which reads as follows: "Should the council at any time reduce the number of firemen in the fire department, those most recently appointed shall be selected for retirement from the fire department, and the city or town clerk shall keep a list of such retired firemen, and should the number of firemen be again increased by the council, the men on said list shall be called into service, the longest service firemen being first selected for service in the fire department." But relator contends that, since the right is given only by this statute, a compliance with the statute is essential to the exercise of the right, and of this there cannot be any question. The pleading and evidence show that of the nine men appointed and serving as members of the Anaconda fire department at the time the relator was dismissed, six had served a shorter period of time than relator. Section 3329 provides that in reducing the force under that section the men shall be chosen for retirement in the inverse order of their appointment, beginning with the member most recently appointed. It is earnestly contended by counsel for appellants that, since the obvious purpose of this law is to secure efficiency of service, to dismiss the fireman who was last appointed would defeat the very intent and purpose of the law if such last appointed member should happen to be one of the most efficient members of the force, and much more efficient than one of longer service. Such an argument would be admirable if addressed to the legislative assembly, but cannot be seriously considered by a court; for so long as our Constitution distributes the powers of government among the three departments—legislative, executive, and judicial—and forbids one department exercising any powers belonging to another, the courts must decline to legislate or to read statutes as some people may think they ought to be written, rather than read them as they are. Section 3329 is too plain to admit of misconstruction. When the legislative assembly pro-

vides in terms so plain and mandatory that in case a reduction is made in the force of a paid fire department, under the provisions of that section, the member of the force most recently appointed shall be selected for retirement first, we must assume that the terms employed express the will of the legislature and of the people; and it would be the grossest usurpation of authority for this court to say that the legislature did not mean what it said, but, on the contrary, meant that the member least efficient, even though oldest in point of service, should be the first to be retired. There is not room, then, for further argument upon this branch of the case. In leaving upon the force of paid firemen six members more recently appointed than relator and attempting to retire relator, who was the third oldest member in point of service among the nine members of the force, the city council of Anaconda violated the plain mandate of section 3329 above. This statute does not allow the council to exercise any discretion in selecting the men to be retired. The last one appointed must be the first one to be retired under circumstances which bring the case within the provisions of that section. The city, then, did not obey the mandate of either section 3328 or section 3329, and its removal of the relator cannot be justified.

5. It is said that the judgment in this instance in effect imposes a compulsory obligation upon a city which has already exceeded the constitutional limit of indebtedness, and authorities are cited in support of the proposition that, if the city is in such financial straits that it cannot voluntarily assume a new obligation, neither the legislature nor the courts can compel it to assume it. With that doctrine we do not find any fault, but we do not think counsel makes a proper application of it to the facts of this case. To meet the very emergency which confronts the city of Anaconda, our legislature passed an Act authorizing cities in such financial condition to pay their running expenses from current revenue upon a cash basis. If the contention which appellants make is applicable in this instance, then a city which has reached the limit of indebtedness may arbitrarily refuse to pay its officers or employees, and defend upon the same ground. If the city of Anaconda has not taken advantage of the law en-

acted for its benefit, it will not be heard to urge its failure to do so as an excuse for its violation of section 3328 or section 3329 above.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH concurs.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, v. BYRD, APPELLANT.

(No. 2,864.)

(Submitted September 15, 1910. Decided October 13, 1910.)

[111 Pac. 407.]

Criminal Law—Homicide—Information—Self-defense—Burden of Proof—Dying Declarations—Appeal—Verdict—Conclusiveness—Preliminary Examination—Waiver.

Criminal Law—Assignment of Errors.

1. It is the policy of the court to construe rules of practice and of court liberally, so that all appeals may be heard upon the merits, and to this end the court, when it can ascertain what errors are assigned, will consider them.

Same—Jury Trial—Extent of Right.

2. In a criminal action the defendant cannot object that a particular juror was not allowed to sit in his case on a challenge for cause; his right being only that he shall be tried by an impartial jury as provided by Constitution, Article III, section 16.

Same—Preliminary Examination—Waiver—Effect.

3. A voluntary waiver of a preliminary examination by defendant charged with homicide has the same legal effect as though a hearing was had.

Same—Information—Leave to File.

4. Under Revised Codes, section 8927, providing that prosecutions in the district court must be by information, and section 8928, providing that applications for leave to file an information before examination and commitment must be made to the court on written motion by the county attorney, it is only where there has been no examination or commitment by a magistrate that the county attorney must move for leave to file an information.

Same—Evidence—Harmless Error.

5. Where a witness testified that he took a pistol from defendant's hand after he had shot and killed a man, but was unable to positively identify the one shown him at the trial, its admission in evidence over

objection was not prejudicial to the defendant where its identity was not questioned.

Same—Admission by Accused—Whether Voluntary.

6. A witness in a prosecution for murder testified that defendant when brought to the jail made an admission as to the shooting, and to an alternative question whether defendant's admission was voluntary, or was the result of threats, fear, etc., answered in the negative. Over objection the witness testified to what defendant had said. *Held*, that the state had made a *prima facie* showing that such admission was voluntary.

Same—Evidence—Statement of Fact.

7. The question whether witness noticed defendant, "whether he appeared to be scared or not," calls for a statement of fact, or a "short-hand rendering of facts," and is not objectionable as asking for a conclusion by the witness.

Same—Appeal—Harmless Error—Prejudice—Presumption.

8. It is for the court to determine whether an error affects the substantial rights of the parties in view of Revised Codes, section 9415, requiring the supreme court to give judgment irrespective of technical errors or defects not involving substantial rights, and it ought no longer to be the rule in criminal cases in this state that where error is shown prejudice will be presumed.

Same—Appeal—Exclusion of Evidence—Offer of Proof.

9. The burden of showing prejudice from the erroneous exclusion of evidence lies on appellant, and hence where, on a trial for homicide, the court improperly excluded, as calling for a conclusion, a question to a witness whether he noticed if defendant appeared to be scared as deceased advanced upon him, and defendant made no offer to show that the witness would have answered that defendant did seem scared, the supreme court cannot presume that he would have so answered so as to make the ruling prejudicial error.

Same—Homicide—Self-defense—Burden of Proof.

10. Under the express provisions of Revised Codes, section 9282, upon trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it is on the defendant, unless the proof for the prosecution tends to show that the crime committed is only manslaughter, or that defendant was justified or excusable.

Same—Self-defense—Instructions.

11. In a prosecution for murder, where defendant claimed to have acted in self-defense, the jury was instructed that if it believed from the evidence that defendant unlawfully killed a person named, by shooting him with a pistol, "and that such killing was not in necessary self-defense, and was not under such circumstances as to be justifiable as defined in these instructions, then the defendant is guilty of murder, in the first degree." Appropriate instructions as to manslaughter were also given. *Held*, that this instruction, read with another instruction in the words of the statute, was sufficiently plain, upon the distinction between murder and manslaughter, to be understood by the jury.

Same—Self-defense—Instruction.

12. An instruction that "no man is justified in taking a human life to repel a mere battery," read with another instruction as to what circumstances will justify homicide, *held* to include all the degrees of battery making homicide justifiable.

Homicide—Dying Declarations—Weight—Questions for Jury.

13. The jury are the judges of the weight and credibility of dying declarations, and, such declarations being in the nature of hearsay testimony, the jury must consider whether a declaration introduced in

evidence is in the exact words of the deceased, and whether it correctly expresses his meaning.

Same—Apprehension of Danger.

14. An instruction: "If you believe the deceased was attempting to do some great bodily injury to the defendant, and defendant took the life of deceased in resisting such attempt, the homicide is justifiable. * * * The great bodily injury mentioned * * * is not limited to such an injury as would constitute a felony, but an unlawful beating at the hands of the assailant may be sufficient"—*held*, properly refused as ignoring the right of defendant as a reasonable man to act upon appearances as they were presented to him.

Same—Dying Declarations—Written Declarations Read to Declarant.

15. Where deceased made an oral statement in the nature of a dying declaration, no other witnesses being present who knew what had taken place, and such statement was reduced to writing and signed by the deceased, and two witnesses to the making of the declaration testified that it was the statement he made, it was admissible in evidence, although it was not in the handwriting of deceased, and was not read over to him before he signed it.

Same—"Dying Declarations"—Condition of Declarant.

16. The rule requiring proof that statements offered as "dying declarations" were made by declarant when *in extremis* does not require that it be shown that they were made while he was literally breathing his last, but is satisfied when it is shown that the declarant died from the wound from which he was suffering at the time they were made; and that such wound was the direct and proximate result of the act which the declarations tend to describe.

Same—Dying Declarations—Sworn to—Effect.

17. The fact that a dying declaration was sworn to does not render it inadmissible.

Same—Dying Declarations—Subsequent Operations.

18. That an operation was performed upon a wounded man after declarations offered as his dying declarations were made, *held*, in view of the other evidence, not to affect the admissibility of such declarations.

Same—Appeal—Verdict—Conclusiveness.

19. Where the evidence in a prosecution for homicide supported the conviction for murder in the second degree, the supreme court will not interfere, though on the evidence they would either have acquitted on the ground of self-defense or at most convicted of manslaughter.

Appeal from District Court, Carbon County; Sydney Fox, Judge.

FREDERICK BYRD was convicted of murder in the second degree, and appeals from the judgment and an order denying him a new trial. **Affirmed.**

Mr. George W. Pierson, in behalf of Appellant, submitted a brief and argued the cause orally.

The court erred in excusing witness Salminen. Trial courts are not at liberty to exercise their caprice in excusing jurors from

the trial of a case on the drawing of their names. (*State v. McHatton*, 10 Mont. 370, 25 Pac. 1046; *Boles v. State*, 24 Miss. 445; *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *Finn v. State*, 5 Ind. 400; *Meyers v. State*, 20 Ind. 511; *Van Blaricum v. People*, 16 Ill. 364, 63 Am. Dec. 316; *Greer v. Norvill*, 3 Hill (S. C.), 262.)

The court erred in modifying defendant's offered instruction numbered 4, by striking out that portion relating to the weight to be given dying declarations. Such declarations are to be received with caution, and without commenting upon the evidence the defendant was entitled to have the jury informed as to the rules applicable to their consideration. The instruction gave the rule as stated by Greenleaf. (See Greenleaf on Evidence, 14th ed., 162; *People v. Taylor*, 59 Cal. 640; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.)

The court erred in admitting in evidence a proffered written dying declaration, not being in deceased's handwriting or having been read to him, or made under the sense of impending death, and permitting the attesting clause to be read when not offered. The declaration should have been read over to deceased in order to make it admissible. (Wharton on Criminal Evidence, sec. 295; Elliott on Evidence, sec. 342; *State v. Fraunburg*, 40 Iowa. 555.) Where one submits to an operation, the declaration cannot be admitted. (*Peak v. State*, 50 N. J. L. 179, 12 Atl. 701; *State v. Gianfala*, 113 La. 463, 37 South. 30.) An insufficient foundation was laid for the introduction of the writing. (*Rakes v. People*, 2 Neb. 157; *Craven v. State*, 49 Tex. Cr. 78, 122 Am. St. Rep. 799, 90 S. W. 311; *Phillips v. State*, 50 Tex. Cr. 127, 94 S. W. 1051; *State v. Phillips*, 118 Iowa, 660, 92 N. W. 876; *Vaughan v. Commonwealth*, 86 Ky. 431, 6 S. W. 153; *Barnes v. Commonwealth*, 110 Ky. 348, 61 S. W. 733.)

In behalf of the State, *Mr. Albert J. Galen*, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, submitted a brief; oral argument by *Mr. Murphy*.

That the court did not commit error in excusing witness Salminen, see *People v. Majors*, 65 Cal. 138, 52 Am. Rep. 295, 3 Pac.

597; *People v. Abbott* (Cal.), 4 Pac. 769; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 180; *State v. Melvin*, 11 La. Ann. 535; *State v. Stewart*, 45 La. Ann. 1164, 14 South. 143; *Gross v. State*, 2 Ind. 329; *Driskill v. State*, 7 Ind. 338; *Smith v. Commonwealth*, 100 Ky. 133, 37 S. W. 586; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Spain v. State*, 59 Miss. 19; *Rhea v. State*, 63 Neb. 461, 88 N. W. 789.

MR. JUSTICE SMITH delivered the opinion of the court.

The defendant was charged by information with the crime of murder, convicted of murder in the second degree, and sentenced to a term of twenty-five years in the state prison. He appeals from the judgment of the court and also from an order overruling his motion for a new trial.

The brief of counsel for the appellant is prefaced with a sort of apology for the manner in which the transcript is prepared. This was unnecessary. We have had no difficulty in ascertaining what alleged errors are relied on. It should be, and is, the policy of this court to so liberally construe rules of practice and of court that all appeals may be heard upon the merits. No necessity exists for any other or different procedure; the court is, to employ a homely expression, now "up with its calendar," the judges are not particularly overworked, and so long as we can ascertain what errors are assigned, we shall consider them, if the transcript and briefs are in such shape as to make it possible to do so. At the same time, the rules of court as they now exist are reasonable and necessary for the expeditious and orderly dispatch of the business of the court, and the judges will appreciate as strict a compliance therewith as is possible under the circumstances of each particular case, as their labors will be thereby greatly lessened.

The brief of the learned counsel for appellant contains twenty-nine specifications of error, which we shall notice in their order of assignment.

1. One Salminen was called as a juror, and in response to questions by the county attorney said he was opposed to capital punishment; that if he believed from the evidence beyond a reasonable doubt, under the instructions of the court, that the

defendant was guilty, and the punishment, or one of the punishments, that might be inflicted was death, he was not certain whether his prejudice would influence him in arriving at a verdict; that his reason was that he felt that taking the life of any human being was wrong, and he would allow that idea to influence him in coming to a verdict. He was excused for cause on challenge by the state, and the defendant excepted. We are unable to sustain the exception. A defendant in a criminal action has no right to insist that any particular juror shall sit in his case. The extent of his right is that the cause shall be tried by an impartial jury. (Montana Constitution, Art. III, sec. 16.) No complaint is made of the jurors who finally tried the case, so that his constitutional rights were not violated. (*State v. Jones*, 32 Mont. 442, 80 Pac. 1095.)

2 and 3. After the state's first witness had been sworn, the defendant objected to the introduction of any evidence under the information, for the reason "that he has not been given a preliminary examination and has not been committed by a magistrate to answer any possible charge in the district court, and no written application or written motion was made by the county attorney for leave to file this information." The overruling of this objection is assigned as error. There is no merit in the assignment. The transcript shows that a complaint was filed with a justice of the peace, charging Byrd with the murder of one Rasmus Hetland; that he was arrested, brought before the justice, informed of his right to have a preliminary hearing, which he waived; and that he was bound over to the district court to answer to the charge of murder. Thereupon a commitment was signed and given to the sheriff. In view of the state of the record, we are somewhat in doubt as to the exact point intended to be made in the assignment. It is clear to us that a voluntary waiver of a preliminary hearing has the same legal effect as though a hearing had been had. Section 8927, Revised Codes, reads thus: "Prosecutions in the district court must be by information: (1) In all cases where there has been an examination and commitment or admission to bail by a magistrate on a charge of crime; or (2) in any case where there has been no examination

or commitment or admission to bail, upon leave granted by the court for that purpose." And section 8928 reads as follows: "Application for leave to file an information before an examination, commitment or admission to bail, must be made to the court on written motion, by the county attorney." It is only in cases where no examination and commitment have been had or made by a magistrate that it is necessary to apply in writing to the district court for leave to file the information.

4. There was no question but that Byrd shot and killed Hetland in front of Meyer's saloon, in the town of Joliet. He admitted the shooting. The witness Headington testified that he took a pistol from defendant's hand. He was unable positively to identify the one shown him at the trial, but said that it looked like the same gun. Over defendant's objection, it was admitted in evidence. No point was sought to be made as to the identity of the weapon, and no prejudice resulted to the defendant, so far as we can see, by its admission in evidence.

5. While Sheriff Bachelder, of Carbon county, was on the witness-stand, he testified that when the defendant was brought to the jail he made a statement with reference to the shooting of Hetland. The witness was asked this question: "And were the statements he made, or any statement he made, freely and voluntarily made by the defendant or in reply to questions by yourself or anyone else in your presence, or were they made as a result of any threats made by yourself or anyone else toward the defendant and through fear on his part or a result of any hope or immunity or offers of reward? A. No, sir; none whatever. Q. You may state what those statements were." Counsel for defendant interposed this objection: "Objected to on the ground it does not appear whether these statements were made voluntarily or not. The witness answered the question, 'No, sir.' He might answer it in the negative and in the affirmative." The court overruled the objection, and the witness answered, "He told me he killed Erasmus Hetland, and said the only thing he was sorry of was his wife and family." We think the state made a sufficient *prima facie* showing that the statement was voluntary. When the defendant was on the stand, he did not deny making

it, although his attention was called thereto. Under these circumstances, no prejudice resulted. (See *State v. De Hart*, 38 Mont. 211, 99 Pac. 438.)

6. Defendant at the trial relied upon a plea of self-defense to justify the killing. One witness, Chamberlain, testified that he witnessed the affair from across the street. He said that Hetland threatened to assault and whip the defendant, and that the latter backed away as Hetland advanced toward him. On cross-examination he was asked this question: "Did you notice Byrd at that time, whether he appeared to be scared or not?" The state objected on the ground that the question called for a conclusion from the witness. The court sustained the objection. This was error. This court has repeatedly decided that such questions are proper, as calling for a "shorthand rendering of facts." (*State v. Lucey*, 24 Mont. 295, 61 Pac. 994; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3; *State v. Vanella*, 40 Mont. 326, 106 Pac. 364.) But was the error prejudicial to defendant's rights? It ought no longer to be the rule in criminal cases in this state that, error being shown, prejudice will be presumed, as was held prior to 1895 when the Codes were adopted. The former practice resulted in altogether too many reversals of criminal cases for technical errors which did not affect the substantial rights of the defendant. Section 9415, Revised Codes, provides: "After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." It is for this court to determine whether an error affects the substantial rights of the defendant. If the point can be decided from an inspection of the record, the court may act accordingly; but it is the duty of the defendant who claims prejudice to make the record so show. In this case we have no means of knowing what answer would have been returned by Chamberlain to the question propounded. If he would have answered that he did not notice the defendant's appearance, or that the latter did not appear to be "scared," then the ruling of the court carried no prejudice. If, on the other hand, he was prepared to answer that the defendant appeared to fear the deceased, such testimony

would have been material to the defendant, and its exclusion would undoubtedly have injured his case. It was within his power to place the trial court and this court in a situation to judge whether or not the answer to the question would benefit him, by offering to prove by the witness that the defendant appeared to be "scared." This he did not do. (See *State v. Gordon*, 35 Mont. 458, 90 Pac. 173.)

7. The witness Ray Willis testified that about three weeks before the shooting he had a conversation with the defendant, in which the latter said that Hetland had ordered him out of the mine, and, when witness asked if Hetland struck at him, he replied, "No, if he had I would have killed him." Witness suggested that, if defendant attempted to haul coal away from the mine, Hetland might waylay him. To this defendant answered, "Well, I will kill him if he does," putting his hand to his pocket. On cross-examination the witness was asked how he came to say that Hetland would waylay the defendant. He answered that it just came into his mind; that he did not think it would occur; never thought it at all; just simply asked the question. Defendant's counsel then said: "I will ask you how you came to say that? What was the occasion for it?" The court interposed: "He has answered that question. There is no use going over the same ground two or three times." Defendant excepted to the ruling of the court. The witness had in effect answered a similar question. The extent to which the cross-examination should be allowed to proceed was a matter within the sound legal discretion of the court. We find no abuse of such discretion.

8. The witness Commock had testified for the state that defendant told him on the Wednesday preceding the killing that he was going to the mine, and "if Erasmus monkeyed with him, he was going to give him something that would fix him." On cross-examination he was asked: "Do you know of Hetland excluding Byrd from the mine or driving him away?" Objected to as not proper cross-examination, and objection sustained. This ruling seems to have been correct.

9. The witness Robinson testified that he had a conversation with Byrd on the night of November 21, 1908, at the Central

Hotel, in Joliet, in which conversation Byrd said he would kill Hetland if he did not settle with him. The killing took place on November 22, 1908. On cross-examination witness testified that in a conversation with defendant's attorney he had not said that he met the defendant on Thanksgiving night, but that he had said that it was on or about that time. He was then asked, "Did you know at the time that the defendant was in jail on Thanksgiving day?" We think the court properly ruled that this question related to an immaterial matter.

10. The witness Mitchell testified: "Byrd said that he would put Hetland out of business; that he was going up there and take nineteen cans of powder that he had on hand, and the cars, and shove them off over the end of the tipple and touch them off after working hours and put him out of business, same as himself was. He said a number of times he was going to kill him. I told him to go to the county attorney. He said he would take the law in his own hands. Byrd came to my livery-stable and talked to a harness-maker who worked there. He was there all the time nearly, right up to the time the man was killed. Talked about killing Hetland all the time. I could not say how many times. Q. Did he say it six times?" By the court: "He has already said he could not say how many times; he was talking about it all the time. There is no use going over the same ground twice." The defendant saved an exception to this ruling. Trial courts should be very liberal in allowing cross-examination within proper and reasonable limits in criminal cases, to the end that the defendant may not be prejudiced. However, under the circumstances, we find no such abuse of discretion here as would appear to have resulted to the prejudice of the defendant's substantial rights.

11. The witness Brophy saw the shooting. After detailing what took place, on cross-examination, he said, "When Hetland followed Byrd up, he raised his hand to strike him, and he was shot in that position." On motion of the county attorney the court ruled thus: "State the position of his hands. Strike the last part of the answer out." We take this to mean that the

words "to strike him" were stricken out. The ruling was extremely technical, but we find no prejudicial error in it. Leave was granted to examine the witness as to the position of Hetland's hands.

12. The witness Meyer testified that on one occasion, in his saloon, when Hetland was not present, Byrd said that if Erasmus Hetland did not settle with him for his claim in the mine "he would fix him; he would kill him." On cross-examination he was asked, "When was the day he and Hetland had trouble in your saloon, in your presence?" This question clearly related to an occasion other than the one mentioned in direct examination when Hetland was not present, and an objection thereto for that reason was properly sustained.

13. Specifications of errors 13, 14, 15, 16, and 16a deal with the question whether the cross-examination of the witness Meyer was improperly curtailed. We have carefully examined all of these specifications of error, and conclude that the action of the court in this regard was sufficiently liberal to allow all material points to get to the jury.

14. Complaint is made of the action of the court in refusing to allow the witness Henry to testify that he warned the defendant to keep away from Hetland, and that defendant said he was afraid of the man whom he afterward killed. If this was error, it was cured by the subsequent action of the court in allowing Henry to give the testimony which was at first excluded.

15. Witness Farrell testified that he had two conversations with Byrd, in which the latter complained of the treatment he had received from Hetland in their mining operations and said he expected to have serious trouble if he did not get a settlement of the difficulties. He was asked on cross-examination, "At this time you knew that Hetland was a very quarrelsome man, didn't you?" This question was objected to as not proper cross-examination. We think the ruling of the court sustaining the objection was correct.

16. Defendant complains of the action of the court in excluding from the consideration of the jury the written agreement con-

cerning the mine which he had entered into with Hetland. This paper-writing might properly have been admitted; but we are satisfied that the testimony of the defendant thereafter given was amply sufficient to illustrate to the jury the relation which deceased and defendant bore to each other with regard to the mine prior to the day of the tragedy.

17. Defendant testified: "I heard the testimony of George Mitchell. I never mentioned a word to him, and never said I would kill Hetland, and never said I would blow up the tippie. Mitchell told a falsehood clean through. Q. Did you ever make any such statement? A. No, sir; what would I want to blow up my own place for?" This last answer was by the court stricken out; but there was no prejudice in the action, because the defendant had already very forcibly answered a similar question.

18. The court instructed the jury as follows: "(9) Upon trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." This instruction is in the words of the statute (Revised Codes, section 9282), and was properly given.

The court also told the jury: "(12) If you believe from the evidence in this case beyond a reasonable doubt that the defendant, Frederick Byrd, on or about the twenty-second day of November, 1908, at the county of Carbon, state of Montana, did unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, kill and murder Rasmus Hetland in the manner and form as charged in the information, by shooting the said Rasmus Hetland with a pistol or revolver as is described in the information, and that such killing was not in necessary self-defense, and was not done under such circumstances as to be justifiable as defined in these instructions, then the defendant is guilty of murder in the first degree, and you will so find by your verdict."

As to these two instructions, taken together, counsel says: "The defendant is presumed to be innocent until the contrary is shown beyond reasonable doubt, and in this case deceased began the affray, according to all the evidence excepting his dying declaration, and the jury should not have been left to themselves to draw the distinction for themselves, and concluded from the general definitions when the burden of proof was cast upon defendant. And, furthermore, the defendant was entitled to an instruction, and it was the duty of the court to particularly call the attention of the jury to the distinction between murder and manslaughter, as the evidence clearly shows defendant was retreating and being followed by deceased in a threatening attitude at the time he fired." We think the instructions are sufficiently plain to enable a person of ordinary understanding to know what they mean. If the defendant desired any explanation thereof, he had the opportunity to tender an instruction embodying his views. The court gave appropriate instructions defining murder and manslaughter, and told the jury that the defendant might be convicted of the latter crime.

It is further objected to instruction No. 12 that it "excludes the condition of excusable homicide, or a reasonable ground to apprehend a design to do some great bodily harm; it being an instruction directing the jury to find a verdict of guilty if they found certain things, it should include every factor of the case." But the court, in other instructions, covered the question of "excusable homicide and a reasonable ground to apprehend a design to do some great bodily harm." It is not necessary for the court to cover every phase of the case in a single instruction. They should be read and construed together.

19. Instruction No. 13 reads as follows: "You are instructed that no man is justified in taking a human life to repel a mere battery, and that the apprehension of no danger other than to save the life of the slayer, to prevent the commission of some felony, or to save the slayer from great bodily harm, will justify a homicide." This criticism is offered thereto: "All batteries must be mere batteries or beatings. The right of self-defense

should not have been so limited or the burden cast upon defendant to determine if the threatened battery was to be a mere battery." The court, however, by instruction No. 7, told the jury in the words of the statute under what circumstances homicide is justifiable. The words are plain and do not include resistance to an attempt to commit any lesser degree of battery than those therein specifically mentioned.

20. Defendant's counsel tendered the following instruction: "You, the jury, are the judges of the weight and credibility to be given dying declarations. Such declarations are in the nature of hearsay testimony, and you are to consider whether the declarations introduced in evidence are the exact words used by the deceased, or whether they correctly express his meaning, or whether the witnesses who testified to such declarations correctly understood the deceased, whether they remember the words and meaning, and whether the words attributed to deceased were in fact spoken by him. [Though these dying declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight, if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination—a power quite as essential to the eliciting of all the truth, as the obligation of an oath can be—and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not infrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is in such cases withdrawn. And it is further to be considered that the particulars of the violence to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed and leading both to mistake as to the identity of persons, and to the omission of facts essentially important to the completeness and truth of the narrative.]" The court gave the first portion

thereof, but refused to give that part, marked in brackets, beginning with the words, "Though these declarations," etc. We think the instruction as given fully and fairly covered the whole matter sought to be impressed upon the minds of the jury. It is said that the instruction as tendered is in the exact words employed by Professor Greenleaf, in his great work on Evidence. This is true; but the argument therein found was intended by the learned author for the general consideration of courts, and was not designed to be given to jurors in particular cases. Whether a declaration is entitled to great weight, or any weight, is, in this jurisdiction, a matter for the jury to decide.

21. Instruction No. 7, tendered by the defendant, reads as follows: "You are instructed homicide by a person is justifiable if committed when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; and in this case if you believe the deceased was attempting to do some great bodily injury to the defendant, and defendant took the life of deceased in resisting such attempt, the homicide is justifiable and you should acquit him. The great bodily injury mentioned in this instruction is not limited to such an injury as would constitute a felony, but an unlawful beating at the hands of the assailant may be sufficient even when the assault is lacking in some of the elements of felony." No error was committed in refusing this instruction. It ignored the right of the defendant, as a reasonable man, to act upon appearances as they were presented to him, and was far less favorable to him than were other instructions, correctly setting forth his right, which the court gave. (See *State v. Rolla*, 21 Mont. 582, 55 Pac. 523, and *State v. Sloan*, 22 Mont. 293, 56 Pac. 364.) We think the jury must have understood from the court's charge that the defendant would not only have been justified in killing the deceased in case the latter was in fact attempting to murder him, or to do some great bodily injury upon his person, as well as in the event that defendant as a reasonable man had reasonable ground to apprehend that such was the case.

22. The following instruction was tendered and refused: "Before a juror should find a defendant guilty of a crime, he should

be so convinced of the guilt of the accused that he, the juror, would be willing to act upon such conviction in matters of the highest interest and greatest concern to himself; and whenever the state of the proof is such that every necessary fact, constituting the offense charged, is not made so evidently to appear from the evidence, that a man of common prudence would act thereon without hesitation, or when consideration of the evidence does not produce that degree of certainty in the mind of a reasonable man, which excludes every reasonable possible construction placed on the acts of the accused, other than that of guilt, a reasonable doubt exists, and the defendant is entitled to an acquittal." The subject of this instruction is "reasonable doubt," and was fully covered by the court in an instruction given, which defines that most confusing expression in a manner many times approved by this court, since the case of *Territory v. McAndrews*, 3 Mont. 158, was decided in 1878.

23. Dr. W. H. Allen testified: "Hetland made a written statement in my presence before his death, relating to the cause of his death and the circumstances thereof. The statement was not written by himself, but by someone else. It was all written by me, except the signature and one line of the date. Mr. Hetland made several statements previous to the writing of this declaration that he was positive that he would never recover from these wounds. I advised him of his physical condition and that recovery was improbable before the writing of the statement. He made the mark there with the cross. The statement was written before Hetland was operated on. I considered the operation the only chance he had. This was explained to him, there was a possible chance of his recovery. He made the statement several times he was almost positive he was going to die. I told him the operation was the only possible chance. He made the statement several times he would never recover. That was before anything was said of the operation. He never regained consciousness after the operation."

J. M. Willis, justice of the peace, testified: "That is my signature at the bottom of the declaration. That is a statement of Mr.

Erasmus Hetland when he [was] on his bed, you might say dying bed, I suppose, the statement he made." The statement as offered reads as follows:

"Joliet, Montana, Nov. 22, 1908.

"Being wounded and feeling that I am in great danger of death I make the following affidavit, to-wit: Left my home in Joliet, Carbon Co., Mont., at 9:30 a. m. on Sunday, Nov. 22, 1908, went down into town, met Frederick Byrd in front of Meyer and Cuno saloon, I said good morning to him. I told him I had been up all night and had to take my wife to the hospital at Bridger. He said he would go out to the mine. I told him I was tired of his coming to the mine, and did not want him to come any more. His answer to that was three shots. I did not lay hands on him nor make any motion to strike him. I considered that the shooting was without provocation and without cause.

his
"ERASMUS X HETLAND.
mark

"Witness: LEWIS HETLAND.

"Erasmus Hetland being duly sworn deposes and says that the above statement is true to the best of his knowledge and belief.

"Sworn to before me this November 22, 1908.

"J. M. WILLIS,

"Justice of the Peace."

Defendant objected to the introduction of the statement in evidence for the following reasons: (1) Because it was not shown that Hetland had lost all hope of recovery, or that the declaration was made under a sense of impending death; (2) that it contains statements not relating to the cause of death and recites the opinion of Hetland; (3) it also recites statements that were no part of the conversation between Byrd and deceased, no part of the *res gestae*; (4) it appears that the declaration is not in the handwriting of Hetland, and there is no evidence that it was read to him; (5) it was not made to appear that Hetland was a competent witness capable of testifying; (6) because there were several eye-witnesses to the affray, and therefore a dying declaration

ought not to be received. The court overruled the objection, and defendant's counsel then moved to exclude certain portions thereof from the consideration of the jury. The court excluded certain parts of the statement, and we are unable to determine from the record what parts were so excluded; but it appears that that portion beginning with the words "I considered" was not read. The only material portion of the statement remaining reads thus: "His answer to that was three shots. I did not lay hands on him nor make any motion to strike him."

The first contention of the defendant on this branch of the case is that the statement was inadmissible, for the reason that the testimony fails to show that the writing was read over to the deceased before he signed it. He cites the case of *State v. Fraunburg*, 40 Iowa, 555. In that case, however, the court remarked that the declaration was not signed by deceased and was a mere memorandum of what he had stated, taken down by the justice of the peace. In other words, that it was not the statement of the deceased, but of the justice, who might have used it to refresh his recollection in giving oral testimony of what the deceased said. 1 Elliott on Evidence, section 342, is also called to our attention. The author there says: "The writing cannot be put in as the declarant's statement unless it has been read over and assented to by him, though it can be used by the writer to refresh his memory as a record of his recollection of the oral statements of the declarant." We understand from the authorities that the courts have always been very careful to first ascertain whether the declaration offered in evidence is in fact the statement of the deceased, and that the rule contended for by the defendant should extend no further than is necessary in order to place the court in possession of this information. In the case at bar none of those present at the bedside of Hetland were witnesses to his encounter with the defendant. He was the only one present who knew what had taken place. He made an oral statement which was reduced to writing by Dr. Allen, and Hetland thereupon signed the same. Dr. Allen and Mr. Willis both say, "That is the statement he made." The statement is brief and not at all complicated.

Either of the witnesses might have been allowed, under all the authorities, to give oral testimony as to what was said. We are not inclined to make nice distinctions between a written statement and oral testimony; or between oral evidence that deceased made the specific declarations contained in the paper-writing, and the categorical averment, "This is his statement."

But it is said that the statement was not made under a sense of impending death. We think the proper rule for the admission of alleged dying declarations is well stated by Mr. Justice Fullerton, of the state of Washington, in the case of *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902, thus: "The witness testified: 'That in the course of this conversation the deceased said that she knew that she could not last long unless there was something done for her; that she did not think that she would ever be taken out of the room where she was lying, until she was packed out; that she could feel her strength leaving her rapidly; that when the witness tried to encourage her, telling her that she must live in hopes, the deceased answered that she had lived in hopes long enough, that she had given up all hopes. She did not say that she believed she was going to die, or that she could not live any longer, or use words to express her belief of her approaching death.' The rule requiring it to be shown that the declarations were made while the declarant was *in extremis* does not require that it be shown that they were made while the declarant was literally breathing her last. The rule is satisfied when it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made, and that the illness from which she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate. It is true that it was not shown that the declarant said, in so many words, that she believed she was going to die, or that she could not live longer; but this was not necessary. The question to be determined here is: Was the trial court justified in believing, from the nature of the evidence, that the declarant believed she was about to die and was without hope or expectancy of recovery? This conclusion must be drawn from the entire

statement and the conditions surrounding the declarant, and not from any specific words she may have used.”

In *Keaton v. State*, 41 Tex. Cr. 621, 57 S. W. 1125, it was said: “There is no form of phraseology in which a party making a dying declaration must indicate the fact that he is conscious of approaching death. So this is done with reasonable clearness it is sufficient. We said, in *Miller v. State*, 27 Tex. Cr. App. 80, 10 S. W. 447: ‘It is enough if it satisfactorily appears in any manner that they [referring to dying declarations] were made under that sanction, whether it be directly proved by the express language of the declarant or be inferred from his evident danger or the opinion of medical or other attendants stated to him, or from his conduct or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant’s mind.’ ”

In *Winfrey v. State*, 41 Tex. Cr. 538, 56 S. W. 919, the Texas court of criminal appeals said: “The court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as must have been known to the declarant, as to whether such declarant was in such a condition of mind as would render his declaration competent.”

The supreme court of Nevada said, in *State v. Roberts*, 28 Nev. 350, 82 Pac. 100: “That dying declarations must be made under a sense of impending death in order to be admissible is well illustrated by the decided cases; but this may be shown, not only by what the injured party said, but by his conduct and condition, and by the nature and extent of his wounds, and it is sufficient if these show that the declarations were made without expectation of recovery and under a sense of impending death, notwithstanding the declarant may not have said that he was without hope or that he was going to die. * * * The controlling point here is a question of fact for the court—the state of mind of the deceased at the time he made the statement. * * * ”

(See, also, *State v. King*, 104 Iowa, 727, 74 N. W. 691; *State v. Boggan*, 133 N. C. 761, 46 S. E. 111; *State v. Craig*, 190 Mo. 332, 88 S. W. 641.)

We think the trial court was justified in believing from his oral declarations and all the surrounding facts and circumstances, that Hetland thought he was about to die. His dying declaration was therefore properly admitted. The fact that it was sworn to does not render it inadmissible. (*State v. Carter*, 106 La. 407, 30 South. 895.) The further circumstance that an operation was afterward performed upon the wounded man does not, in view of the other facts, change our opinion as to the admissibility of the declaration.

24. It is finally suggested that the evidence is insufficient to justify a verdict of murder. No useful purpose would be served by encumbering the reports with a recital of it, even in substance. Because of the numerous specifications of error, each one of which we have felt it our duty to notice particularly, this opinion has already become lengthy. In our judgment, there is barely sufficient evidence to justify a verdict of murder in the second degree, while the great preponderance seems to indicate that defendant should either have been acquitted on the ground that the homicide was justifiable, or should, at most, have been convicted only of manslaughter. The jury were the judges of the weight to be given to the testimony. Unless we can say that the evidence was insufficient to justify the verdict, we have no power to interfere. We cannot say that. We may not substitute our judgment for that of the jury. We do think, however, that the attention of the governor might properly be called to the case, at some future time.

The judgment and order of the district court of Carbon county are affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS, DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 2,811.—HORACE E. MARTIN, RESPONDENT, v. BERTHA E. MARTIN, APPELLANT.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Decided March 26, 1910.

PER CURIAM.—It is ordered that the appeal herein be, and the same is hereby, dismissed in accordance with request of counsel for appellant.

Messrs. Walsh & Nolan, for Appellant.

Messrs. Ayers & Marshall, and Messrs. Hartman & Hartman, for Respondent.

No. 2,856.—THE STATE OF MONTANA EX REL. ROSE TREFRY, RELATRIX, v. DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, AND THE HON. JEREMIAH J. LYNCH, A JUDGE THEREOF, RESPONDENTS.

Original application for writ of supervisory control.

Decided April 6, 1910.

PER CURIAM.—Petition of relatrix for writ of supervisory control herein, heretofore submitted, was, after due consideration, by the court denied.

Messrs. Mackel & Meyer, for Relatrix.

No. 2,863.—THE STATE OF MONTANA EX REL. A. L. WARD,
RELATOR, v. DISTRICT COURT OF THE FIFTH JUDI-
CIAL DISTRICT AND THE HON. J. B. POINDEXTER, A
JUDGE THEREOF, RESPONDENTS.

Original application for writ of prohibition.

Decided May 2, 1910.

PER CURIAM.—Relator's application for writ of prohibition herein, heretofore submitted, is, after due consideration, by the court denied.

Mr. C. R. Stranahan, and Mr. C. W. Wiley, for Relator.

No. 2,836.—FRITZ HARDER, RESPONDENT, v. NICK HUGHES,
APPELLANT.

*Appeal from District Court, Yellowstone County; Sydney Fox,
Judge.*

Decided June 20, 1910.

PER CURIAM.—It is ordered that the appeal in the above-en-
titled cause be, and the same is hereby, dismissed on motion of
appellant on file herein.

Mr. W. M. Johnston, for Appellant.

No. 2,837.—CONRAD SCHMIDT, RESPONDENT, *v.* NICK HUGHES, APPELLANT.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Decided June 20, 1910.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, in accordance with motion of appellant on file herein.

Mr. W. M. Johnston, and Mr. H. J. Coleman, for Appellant.

No. 2,886.—THE STATE OF MONTANA EX REL. J. M. JOHNSON, RELATOR, *v.* JOHN A. COLLINS, SHERIFF, RESPONDENT.

Original application for writ of mandate.

Decided June 25, 1910.

PER CURIAM.—The relator's application for writ of mandate herein is, after due consideration, by the court denied.

Mr. H. S. McGinley, for Relator.

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No. 2,853.—D. R. SNIDER ET AL., APPELLANTS, *v.* BENJAMIN YARBROUGH ET AL., RESPONDENTS.

'Appeal from District Court, Madison County; Llew. L. Callaway, Judge.

Decided July 2, 1910.

PER CURIAM.—Respondents' motion to dismiss the appeal herein, supported by affidavits and certificates of clerk of the district court, heretofore submitted, is, after due consideration, by the court sustained and the appeal is dismissed accordingly. (Mr. Justice Smith dissenting.)

Messrs. Clayberg, Maloney & O'Flynn, for Appellants.

Messrs. Clark & Duncan, for Respondents.

No. 2,852.—THE STATE OF MONTANA' EX REL. LUDWIG SCHATZ, RELATOR, *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, RESPONDENT.

Original application for writ of supervisory control.

Decided July 6, 1910.

PER CURIAM.—It is ordered that the above-entitled proceeding be, and the same is hereby, dismissed without prejudice.

Messrs. Clayberg, Maloney & O'Flynn, for Relator.

No. 2,875.—THE STATE OF MONTANA, RESPONDENT, v.
JOHN R. CLARK, APPELLANT.

*'Appeal from District Court, Fergus County; E. K. Cheadle,
Judge.*

Decided July 23, 1910.

PER CURIAM.—Appellant's motion to dismiss the appeal herein without prejudice is, after due consideration, by the court sustained, and the appeal is accordingly dismissed.

Messrs. Ayers & Marshall, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

No. 2,844.—LAURA A. GRAHAM, AS ADMINISTRATRIX OF THE
ESTATE OF JAS. S. GRAHAM, DECEASED, RESPONDENT, v.
NORTHERN PACIFIC RAILWAY CO. ET AL., APPELLANTS.

*'Appeal from District Court, Missoula County; F. C. Webster,
Judge.*

Decided August 20, 1910.

PER CURIAM.—It is ordered upon motion of counsel for the appellants herein that the appeal in the above-entitled cause be, and the same is hereby, dismissed.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and Mr. R. F. Gaines, for Appellants.

Messrs. Woody & Woody, for Respondent.

No. 2,893.—THE STATE OF MONTANA *EX REL.* W. B. DOLENTY, RELATOR, *v.* DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT, AND THE HON. W. R. C. STEWART, JUDGE THEREOF, RESPONDENTS.

Original application for writ of prohibition.

Decided September 17, 1910.

PER CURIAM.—Upon suggestion of counsel for the relator, it is ordered that the proceedings herein be, and they are hereby, dismissed.

Messrs. Kanouse & Schmidt, and Messrs. Wight & Pew, for Relator.

No. 2,936.—THE STATE OF MONTANA *EX REL.* K. R. WILBER, RELATOR, *v.* THE CITY COUNCIL OF GREAT FALLS ET AL., RESPONDENTS.

Original application for writ of mandate.

Decided October 4, 1910.

PER CURIAM.—Relator's petition for writ of mandate herein, heretofore submitted, is, after due consideration, by the court denied.

Mr. H. S. McGinley, for Relator.

Nos. 2,891 and 2,892.—THE STATE OF MONTANA, RESPONDENT, *v.* HENRY EDGAR WHITTAKER, APPELLANT.

Appeals from District Court of Chouteau County; John W. Tattan, Judge.

Decided October 4, 1910.

PER CURIAM.—Upon motion of the attorney general, it is ordered that the appeals in the above-entitled causes be, and the same are hereby, dismissed for failure on the part of appellant to file briefs.

Mr. R. H. Jones, for Appellant.

Mr. Albert J. Galen, Attorney General, for Respondent.

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ACCIDENT INSURANCE.

See Insurance.

ACCOUNTING.

Who may not Claim.

1. One who has not made a demand for an accounting may not, and one who knows exactly the amount claimed to be due him has no occasion to, invoke the aid of a court of equity for an accounting.—*Alywin v. Morley et al.*, 191.

Counterclaims Against Codefendant—Pleading.

2. *Quaere*: In view of the fact that section 6541, Revised Codes, defining a counterclaim, makes no mention of a claim by one defendant against another, may a defendant obtain affirmative relief against a codefendant, under the Code practice, in an action for an accounting, by filing a pleading in the nature of a counterclaim?—*Alywin v. Morley et al.*, 191.

Case Made as Between Defendants—Pleadings—Insufficiency.

3. Plaintiff brought an action for an accounting. The facts stated in his complaint were upon trial found to be untrue, and his action was dismissed. One of defendants filed an answer asking for an accounting against her codefendants. This pleading was insufficient in that she had never made any demand for an accounting. She obtained judgment as prayed. *Held*, that the court erred in granting the relief thus asked, in that, assuming that *where plaintiff has and states a cause of action* for an accounting, the court may, in order to avoid a multiplicity of suits, determine the whole controversy, settle the rights of the defendants *inter sese* and grant one defendant affirmative relief against a codefendant, even though his answer may be insufficient to support a judgment, the allegations of plaintiff's complaint which he failed to substantiate had become so much surplusage, and, the defendant's pleading having proven insufficient, there was therefore not *any* pleading to sustain the decree.—*Alywin v. Morley et al.*, 191.

ACTIONS.

Dismissal by supreme court, on appeal,—see Appeal and Error, 5.

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ADMISSIONS.

Admissibility in evidence,—see Criminal Law, 19.

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Notice of appeal, service on,—see New Trial, 4.

AMENDMENTS.

Of cost bill, refusal, when abuse of discretion,—see Costs, 1, 2.

Of pleadings after judgment,—see Pleading and Practice, 28.

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Of pleadings, objections to, when too late,—see Pleading and Practice, 17.

Of statutes,—see Statutes and Statutory Construction, 2.

ANNUITY AND MORTALITY TABLES.

See Personal Injuries, 20.

APPEAL AND ERROR.

Equity Cases—Findings—Review.

1. The findings of the district court in an equity case, attacked on the ground of the insufficiency of the evidence to support them, will not be disturbed by the supreme court unless the evidence clearly preponderates against them.—*Kelly v. Granite Bi-Metallic C. Min. Co.*, 1; *White v. Barling*, 138; *Alywin v. Morley et al.*, 191; *Murray v. Butte-Monitor Tunnel Min. Co.*, 449; *Consolidated Gold & Sapphire Min. Co. v. Struthers*, 551.

Briefs—Failure to Point Out Evidence—Presumptions.

2. Where the brief of appellant fails to point out evidence in support of his contention relative to a given subject, the supreme court will not search the record to find it, but indulge the presumption that there was no evidence on the point.—*Kelly v. Granite Bi-Metallic C. Min. Co.*, 1.

Demurrer—Grounds—When Ruling Affirmed.

3. An order of the district court, general in terms, sustaining a demurrer which attacked the complaint on several grounds, will be upheld on appeal if justifiable upon any one of the grounds urged.—*Paine et al. v. British-Butte Min. Co.*, 28.

Equity Cases—Rulings on Evidence—Review.

4. The rule that the supreme court will not order a reversal in equity cases on the ground that the trial court improperly admitted or rejected evidence, has no application where the evidence in question was of import, and it is not reasonably apparent that the error complained of did not result in prejudice.—*Rumping v. Rumping*, 33.

Supreme Court—Dismissal of Action—Jurisdiction.

5. The supreme court is without jurisdiction to dismiss an action brought before it on appeal; its power to dismiss actions or proceedings is confined to those commenced in the appellate court.—*Miley v. Northern Pacific Ry. Co.*, 51.

Evidence—Admissibility—Pleading—Review.

6. Where evidence was admitted without objection, the question whether its introduction was warranted by the pleadings will not be considered on appeal.—*Archer et al. v. Chicago, M. & St. P. Ry. Co.*, 56.

Conflicting Evidence—Verdict—Conclusiveness.

7. Where, in an action at law, the testimony is conflicting in substantial particulars, the verdict of the jury will not be disturbed on appeal under an assignment that the evidence is insufficient to justify it.—*Murphy et al. v. Cooper*, 72.

Appeal—Rehearing—Questions not Reviewable.

8. The sufficiency of a counterclaim may not be called in question for the first time on motion for a rehearing in the appellate court.—*Murphy et al. v. Cooper*, 72.

Same—Statutory Requirements—Substantial Compliance.

9. Appeals are subject to statutory regulation, and in order to confer jurisdiction upon the appellate court there must be at least a substantial compliance with the statute.—*State ex rel. Rosenstein v. District Court*, 100.

Same—From Justices' Courts—Notice—Contents.

10. The notice of appeal from a justice's court to the district court, required by section 7121, Revised Codes, must describe the particular judgment or order appealed from by reference to the court which rendered it, to the parties litigant, and to the date, and amount or character of it, in terms sufficiently specific to identify it, without resort to extrinsic evidence.—*State ex rel. Rosenstein v. District Court*, 100.

Same—Justices' Courts—Notice—Contents—Prohibition.

11. *Held*, on application for writ of prohibition that a notice of appeal from a justice's to the district court which did not state the nature and amount of the judgment complained of and gave the date of it as "the — day of September, 1909," failed to identify the judgment appealed from, and was therefore insufficient to give the district court jurisdiction.—*State ex rel. Rosenstein v. District Court*, 100.

Water Rights—Evidence—Exclusion—Record—Presumptions.

12. Error may not be predicated upon the action of the trial court in excluding competent testimony offered in a water right suit which was tried without the aid of a jury, where appellant subsequently succeeded in incorporating such testimony into the record. The presumption obtains that the court, in arriving at a conclusion, considered it.—*White v. Barling*, 138.

Appeal—Necessary Parties.

13. Where, in a suit for an accounting, a defendant obtained a judgment against two codefendants, who appealed therefrom, the plaintiff, as to whom the complaint was dismissed, and the remaining defendant, were not necessary parties to the appeal.—*Alywin v. Morley et al.*, 191.

Instructions—Objections and Exceptions—Review.

14. Under subdivision 5 of section 6746, Revised Codes, the supreme court cannot reverse a judgment and direct a new trial for error in an instruction, unless at the time of settlement in the trial court specific objection was made to it, pointing out the error alleged, and an exception preserved to the action of the court in overruling the objection.—*Poor, Admr., v. Madison River Power Co.*, 236.

Conflicting Evidence—Verdict—Conclusiveness.

15. The verdict of the jury will not be disturbed on appeal on the alleged ground that the evidence is insufficient to justify it, where from the testimony before them they could have found the issues in favor of either party.—*Poor, Admr., v. Madison River Power Co.*, 236.

Justices' Courts—Appeal—Notice—Service—Waiver—General Appearance.

16. *Held*, that where plaintiff, having obtained judgment in a justice of the peace court, asked for and obtained leave on appeal by defendant to the district court, to file a supplemental complaint, he, by his general appearance, waived any defect in the service of the notice of appeal.—*Davidson v. O'Donnell et al.*, 308.

Same—Action on Official Bond—Defense—Waiver—Evidence—Admissibility.

17. In an action against a justice of the peace and the sureties on his official bond, for alleged misconduct on the former's part in falsely marking a notice of appeal as filed two weeks later than it was actually

filed, by reason of which wrongful act plaintiff's appeal was dismissed and he compelled to pay the amount of the judgment appealed from by him, it was error to exclude from evidence a minute entry of the district court which disclosed that the party who asked to have the appeal dismissed, because of untimely service of the notice of appeal, had waived such defect by his general appearance. If notwithstanding the justice's wrongful act the district court acquired jurisdiction of the appeal, by reason of the waiver, his act was not a proximate, or any, cause of the dismissal, and hence the evidence thus excluded would have amounted to a complete defense in the action on the justice's official bond.—*Davidson v. O'Donnell et al.*, 308.

Presumptions—Burden of Showing Error.

18. On appeal the presumption obtains that the trial court did not commit error. The burden, therefore, rests upon appellant to show that error was in fact committed.—*Cassidy v. Slemons & Booth*, 426.

Erroneous Exclusion of Evidence—Error Cured by Subsequent Admission.

19. Error in excluding evidence is cured by the subsequent admission of testimony eliciting substantially the information sought in the first instance.—*Cassidy v. Slemons & Booth*, 426.

New Trial Order—Affirmance, When.

20. Where an order granting a new trial does not disclose the particular ground upon which the court based its action, it will be affirmed if it can be justified upon any of the grounds properly laid in the motion asking a retrial.—*Welch v. Nichols*, 436.

Same—Conflicting Evidence—Affirmance.

21. If on an appeal from an order granting a new trial it appears that the evidence presents a substantial conflict, the order will be affirmed (unless it expressly excludes the ground of insufficiency of the evidence), even though the moving party was not as a matter of right entitled thereto on any alleged error of law.—*Welch v. Nichols*, 436.

Same—Insufficiency of Evidence—Discretion.

22. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the discretion of the trial court; its action thereon will not be disturbed unless it is manifest that such discretion has been abused.—*Welch v. Nichols*, 436.

Judgment in Excess of Verdict—Modification.

23. Where a judgment in an action at law awards a larger measure of relief than is warranted by the verdict, it will be modified on appeal and a new trial denied.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

Assignment of Errors—Review.

24. It is the policy of the court to construe rules of practice and of court liberally, so that all appeals may be heard upon the merits, and to this end the court, when it can ascertain what errors are assigned, will consider them.—*State v. Byrd*, 585.

Criminal Law—Harmless Error—Prejudice—Presumption.

25. It is for the court to determine whether an error affects the substantial rights of the parties in view of Revised Codes, section 9415, requiring the supreme court to give judgment irrespective of technical errors or defects not involving substantial rights, and it ought no longer to be the rule in criminal cases in this state that where error is shown prejudice will be presumed.—*State v. Byrd*, 585.

Same—Evidence—Harmless Error.

26. Where a witness testified that he took a pistol from defendant's hand after he had shot and killed a man, but was unable to positively identify the one shown him at the trial, its admission in evidence over

objection was not prejudicial to the defendant where its identity was not questioned.—State v. Byrd, 585.

Same—Appeal—Verdict—Conclusiveness.

27. Where the evidence in a prosecution for homicide supported the conviction for murder in the second degree, the supreme court will not interfere, though on the evidence they would either have acquitted on the ground of self-defense or at most convicted of manslaughter.—State v. Byrd, 585.

APPEARANCE.

Justices' Courts—Appeal—Notice—Service—Waiver—General Appearance.

1. *Held*, that where plaintiff, having obtained judgment in a justice of the peace court, asked for and obtained leave on appeal by defendant to the district court, to file a supplemental complaint, he, by his general appearance, waived any defect in the service of the notice of appeal.—Davidson v. O'Donnell et al., 308.

ARBITRATION.

See Insurance, 6.

ASSIGNMENT OF ERRORS.

See Appeal and Error, 24.

ATTORNEYS.

Fees—Evidence—Insufficiency—New Trial.

1. *Held*, that the evidence introduced in an action to recover an attorney's fee was insufficient to justify a verdict in favor of plaintiff, and that defendant was entitled to a new trial as a matter of right.—McHatton v. Girard, 387.

BANKS AND BANKING.

Promissory Notes—Authority of Cashier.

1. Defendant was induced by the cashier of a bank to sign and deliver a note to the bank, in order that the cashier might substitute it for notes of his own held by the bank, under the assurance of the cashier that he would not be liable upon it, and would never be asked to pay it. The cashier turned the note in to the bank, withdrew his own, and received the excess of the note over his indebtedness to the bank in money. There was no evidence that the officers or directors of the bank had authorized the cashier to make any such arrangement with defendant, who never before had any dealings of like kind with the cashier. *Held*, that the latter had no authority, by virtue of his office, to make such an arrangement; that defendant was chargeable with notice that the arrangement was not authorized, and, hence, that defendant acted upon the cashier's statement at his peril.—State Bank of Moore v. Forsyth, 249.

Same—Consideration—Sufficiency.

2. Defendant's note, given to be substituted for the cashier's notes referred to in paragraph 1 above, was supported by a sufficient consideration, since the cashier's notes were withdrawn from the bank's assets and the excess of the amount of defendant's note over the cashier's obligations was paid by the bank to the latter.—State Bank of Moore v. Forsyth, 249.

Same—Consideration—Fraud.

3. Defendant, who knew, or should have known, that the cashier, in requesting him to sign the note so as to be able to substitute it for his own obligations, because it "would not look well to the bank ex-

aminer" to find his paper in the bank, was engaged in perpetrating a fraud upon plaintiff, could not escape liability on the alleged ground that the note had been given without consideration.—*State Bank of Moore v. Forsyth*, 249.

Same—Knowledge of Cashier, When not Imputable to Bank.

4. The knowledge possessed by plaintiff's cashier that defendant received nothing for the note executed by him could not be imputed to the bank, since, while the knowledge of an agent is generally imputable to his principal, the rule does not apply where the conduct of the former is such as raises a clear presumption that he would not communicate the fact in dispute, as where, by imparting knowledge to the principal, the consummation of a fraud in which the agent was engaged would be prevented.—*State Bank of Moore v. Forsyth*, 249.

BOARD OF COUNTY COMMISSIONERS.

Power to change boundaries of townships,—see *Counties*, 1, 2.

BRIEFS.

See *Appeal and Error*, 2, 24.

BROKERS.

Sale of Corporate Stock—Breach of Contract—Measure of Damages.

1. Where, after the breach of an agreement to purchase certain shares of stock from plaintiff brokers, under the terms of which defendants were bound to receive and pay for the same within a stipulated number of days, at which time title should pass, plaintiffs sold the stock in open market at the best available price, the measure of damages was the difference between the price fixed in the contract and the value of the shares to the seller—such value to be determined as provided in section 6081, Revised Codes.—*Welch v. Nichols*, 435.

BURDEN OF PROOF.

On application for suit money,—see *Divorce*, 1.

Meetings of city council,—see *Cities and Towns*, 15.

Transfer of Personal Property—Pledge or Sale.

1. Where a transfer of property is absolute on its face, the party asserting that it was intended as security only assumes the burden of showing such fact by clear and satisfactory proof; where, however, there is a contemporaneous agreement to reconvey, the burden is upon him who contends that the instrument was an absolute sale.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

Cities and Towns—Meetings of Council—Special.

2. Plaintiff in an injunction suit to restrain the payment of municipal funds for work done in repairing sidewalks, one ground of whose complaint was that though the meeting of the council at which the walk was ordered replaced was a special one, it was held without any notice, proclamation or message of the mayor required to be given by section 3250, Revised Codes, had the burden of proving that the meeting was a special one.—*O'Brien v. Drinkenberg*, 538.

Homicide—Self-defense.

3. Under the express provisions of Revised Codes, section 9282, upon trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it is on the defendant, unless the proof for the prosecution tends to show that the crime committed is only manslaughter, or that defendant was justified or excusable.—*State v. Byrd*, 585.

CARRIER AND PASSENGER.

See Personal Injuries, 21-24.

CITIES AND TOWNS.

Defective sidewalks,—see Personal Injuries, 28-30.

Streets—Dedication—Estoppel *in Pais*.

1. Where defendant city had for more than twenty years permitted plaintiff to remain in undisturbed possession of, and put permanent improvements upon, a piece of land, after an alleged dedication of a portion thereof for street purposes, and great injury would result to plaintiff's premises from the opening of a street through them, the doctrine of estoppel *in pais* is applicable, and the city may not be heard to assert its right to devote to public use, without compensation to the owner, the portion of the property desired for street purposes.—*Von Tobel v. City of Lewistown*, 226.

Officers—Contempt—Violation of Metropolitan Police Law—Evidence—Sufficiency.

2. Where, after the mayor of a city had been directed by writ of mandate to reinstate certain policemen in their respective offices from which they had been ousted contrary to the provisions of the Metropolitan Police Law (Revised Codes, secs. 3304-3317), his action in instructing the chief of police to include two special policemen, whose appointment had theretofore been made without warrant of law and whose continued employment would consume the funds available for police purposes to the exclusion of those whose reinstatement had been ordered, among those who were to be regularly employed, constituted sufficient justification for finding him guilty of contempt of court.—*State ex rel. Edwards v. District Court*, 369.

Same—*Mandamus*—Contempt—Who may be Guilty of.

3. It was not necessary that aldermen of a city, who, knowing of the issuance of a writ of mandate to the mayor commanding him to reinstate in office certain policemen, theretofore unlawfully removed, and ordering their salaries to be paid, by their concerted action assisted the latter in defeating the purpose of the order of court, should have been parties to the original *mandamus* proceeding or served with the writ, to make punishment for their contumacious conduct in obstructing the administration of the law proper.—*State ex rel. Edwards v. District Court*, 369.

Same—*Mandamus*—Scope of Order—Law of the Case.

4. By affirming the judgment of the district court directing, on proceedings in *mandamus*, the reinstatement of policemen to their offices and the emoluments thereof, the supreme court impliedly held that the remedy by writ of mandate was available to secure to a public officer the salary attached to his office; hence argument on the question, on application for a writ of supervisory control to annul a judgment in contempt, was foreclosed.—*State ex rel. Edwards v. District Court*, 369.

Metropolitan Police Law—Examining and Trial Board—Creation of Office.

5. In cities of the first class the office of member of the Examining and Trial Board of the police department is created by the Metropolitan Police Law (Revised Codes, section 3304), which commands, in effect, that there shall be such a board; hence the contention that there was no such office until the mayor had nominated its members and the council had confirmed them was without merit.—*State ex rel. Buckner v. Mayor of Butte*, 377.

Police Department—*De Facto* Officers—Validity of Acts.

6. Where the mayor of a city of the first class had appointed three residents to constitute the Examining and Trial Board of the police

department created by section 3307, Revised Codes, such persons, having qualified, were *de facto* officers whose official acts were legal notwithstanding the city council repeatedly refused to confirm them. State ex rel. Buckner v. Mayor of Butte, 377.

Railroads—Excessive Speed of Trains in Cities—Negligence *Per Se*.

7. The running of a railroad train in a city in excess of the rate of speed fixed by ordinance is negligence *per se*, and where this lapse of duty directly contributes to an injury, liability attaches to the person responsible therefor.—Neary v. Northern Pacific Ry. Co., 480.

Same—Duty of Railway Engineer Approaching City Limits.

8. An engineer in charge of a railway locomotive who, on approaching the limits of a city or town at a speed prohibited by ordinance, observes a person upon the tracks over which he is about to pass, must instantly reduce his speed to the ordinance limit, and may not rely upon the presumption that such person will upon signal assume a place of safety.—Neary v. Northern Pacific Ry. Co., 480.

Use of Streets—Extent of Powers of Council.

9. The municipal authorities which have control of streets and highways may use or permit the use of them in any manner or for any purpose reasonably incident to the appropriation of them to public travel, not only in view of the necessities and requirements of the public as they existed at the time the highway was created, but also in view of the constantly changing modes of travel and transportation brought about by the increase of population and expansion in the volume of traffic. For such changing public uses the owner of abutting property is presumed to have received compensation when the way was created.—Kipp v. Davis-Daly Copper Co., 509.

Same—Rights of Abutting Owners.

10. If a particular use of streets to which consent has been given by the municipal authorities is in the nature of a public use, and is not more burdensome than other public uses which may have been within possible contemplation at the time the way was created, it is not a taking or damaging of property of abutting owners within the constitutional provision that just compensation must first be made.—Kipp v. Davis-Daly Copper Co., 509.

Same—Street Railroads—Hauling Freight—Mining—Public Use.

11. *Held*, that the use to which a railroad proposed to be constructed in the streets of a city by a mining company was to be put in hauling supplies, ores, etc., to and from the company's mine, as well as supplies, ores, merchandise, etc., which might be offered for carriage by any person or corporation, was a public use.—Kipp v. Davis-Daly Copper Co., 509.

Same—Street Railroads—Additional Servitude—Rights of Abutting Owners.

12. *Held*, that a railroad proposed to be constructed by a mining company over the streets and entirely within the limits of a city, for the carriage of supplies, ores, etc., which would otherwise have to be conveyed by teams, is not a "commercial" railroad, as distinguished from street railroads; that such contemplated use of the city's streets falls within their ordinary uses; and that, therefore, no additional servitude is cast upon the owner of abutting real property for which compensation must first be made.—Kipp v. Davis-Daly Copper Co., 509.

Same—Injunction—Pleading—Conclusions.

13. The bare statement in a complaint asking for an injunction to restrain a mining corporation from constructing a railroad upon and along the streets of a city under an ordinance granting it the right to do so, that said ordinance was unreasonable, was a mere conclusion, and in-

sufficient to warrant any relief on the ground that the council abused its discretion in enacting it.—*Kipp v. Davis-Daly Copper Co.*, 509.

Metropolitan Police Law—Contempt Proceedings—Questions Reviewable.

14. In proceedings, under writ of supervisory control, to review the action of the district court in holding that the mayor of a city to whom a writ of mandate had been issued to restore certain policemen to their offices, from which they had been unlawfully ousted by him (Revised Codes, secs. 3304–3317), was not in contempt of court, the only question presented to the appellate court for determination was whether said mayor had actually and in good faith obeyed the order by restoring the officers to their places. Hence the question whether he could, as he did shortly after such restoration, relieve the men from active duty and place them on the eligible list, provided for by the Metropolitan Police Law, *supra*, and other kindred propositions not theretofore presented to the district court for adjudication, were not properly determinable.—*State ex rel. Rowling v. District Court*, 532.

Meetings of Council—Special—Burden of Proof.

15. Plaintiff in an injunction suit to restrain the payment of municipal funds for work done in repairing sidewalks, one ground of whose complaint was that though the meeting of the council at which the walk was ordered replaced was a special one, it was held without any notice, proclamation or message of the mayor required to be given by section 3250, Revised Codes, had the burden of proving that the meeting was a special one.—*O'Brien v. Drinkenberg*, 538.

Sidewalks—Powers of Council—Discretion.

16. In the absence of an allegation that the city council, in ordering a wooden sidewalk to be replaced by a concrete walk, abused its discretion or was guilty of fraud, a finding that such walk did not need replacing was immaterial, since the council's action in the premises was in the exercise of a legislative function, and subject to judicial review only for fraud or abuse of discretion.—*O'Brien v. Drinkenberg*, 538.

Town Council—Special Meeting—Call for—Evidence—Insufficiency.

17. Where the plaintiff, in order to substantiate his claim that a mayor in calling a special meeting of the city council had not issued a proper call as required by subdivision 9 of section 3250, Revised Codes, made no attempt to introduce and have read the call, but simply introduced the minutes of such meeting, which tended to contradict the allegation of the complaint in that regard, a finding of the court in favor of plaintiff on that issue was not sustained by the evidence.—*O'Brien v. Drinkenberg*, 538.

Minutes of Council—Manner of Keeping.

18. The law does not contemplate that the proceedings of the council of a municipality shall be kept with the formality and nicety of the minutes of a court of record.—*O'Brien v. Drinkenberg*, 538.

Sidewalks—Ordinances—Findings.

19. The burden of proving the allegation that there was no ordinance authorizing the town council to condemn a board walk and order its replacement by a concrete one was not sustained by plaintiff in producing testimony of a witness who stated that he had examined the book of ordinances of the town and that there was no resolution or ordinance to be found therein fixing the grade of the town, and by that of another to the effect that there was a sidewalk ordinance, but that he was not "well enough versed in the ordinances to know."—*O'Brien v. Drinkenberg*, 538.

Contracts—Bids—Evidence—Findings.

20. Evidence held insufficient to support a finding of the court that contracts aggregating in amount the sum of \$461 for the construction

of cement sidewalks had been let by the town council without receiving bids for such work.—O'Brien v. Drinkenberg, 538.

Same—Validity—Attack.

21. To successfully attack the letting of a contract for a municipal improvement, plaintiff must show that it was not let to the lowest responsible bidder, and that there was not any opportunity afforded for competitive bidding, or that there was collusion or bad faith on the part of the council, or such gross mistake as to preclude the exercise of sound judgment.—O'Brien v. Drinkenberg, 538.

Mandamus—Firemen—Reinstatement.

22. *Mandamus* lies to reinstate a fireman who has been discharged in violation of the Act placing paid fire departments under civil service rules. (Revised Codes, secs. 3326 *et seq.*)—State ex rel. Drifill v. City of Anaconda, 577.

Fire Department—Unlawful Discharge of Member—Mandamus—Complaint—Sufficiency.

23. The statement of plaintiff, a discharged fireman, in his affidavit for writ of mandate to compel his reinstatement, that he had been duly appointed and confirmed as a member of the fire department, and that at all times he had the physical ability to perform his duties as such, was a sufficient allegation that he possessed the qualifications of a fireman as defined in section 3330, Revised Codes.—State ex rel. Drifill v. City of Anaconda, 577.

Same—Power of Council.

24. Since a fireman is not to be deemed a municipal officer (Revised Codes, sec. 3327), section 3220, providing that the city council may discharge "any officer" whose appointment is made by the mayor, with the advice and consent of the council, had no application to him.—State ex rel. Drifill v. City of Anaconda, 577.

Same—Removal of Member—Charges in Writing—Waiver.

25. Plaintiff was removed from his position as a paid fireman, without any charges having been preferred, a hearing had and the accused found guilty, as prescribed by section 3328, Revised Codes. He subsequently petitioned the city council for reinstatement. *Held*, that plaintiff's action in asking for reinstatement after his discharge did not constitute a waiver of his right to be confronted with written charges as one of the conditions precedent to his removal.—State ex rel. Drifill v. City of Anaconda, 577.

Same—Reduction in Force—Discretion.

26. Under section 3329, Revised Codes, the city council must, if it deems it necessary to reduce the number of paid firemen, retire the one last appointed, and may not exercise any discretion in the premises and discharge the one thought least efficient, even though oldest in point of service.—State ex rel. Drifill v. City of Anaconda, 577.

Same—Unlawful Removal of Member—Economy—When No Defense.

27. A city which, having reached the constitutional limit of indebtedness, finds itself in financial straits, will not be heard to say, in defense of its violation of a civil service statute in removing a fireman contrary to its provisions, that it did so to reduce expenses, where it has failed to take advantage of the Act (Revised Codes, secs. 3287, 3288) authorizing cities in such condition to pay their running expenses from current revenues upon a cash basis.—State ex rel. Drifill v. City of Anaconda, 577.

CIVIL SERVICE LAWS.

Fire department,—see Cities and Towns, 22-27.

Police department,—see Cities and Towns, 2-6, 14.

CLAIM AND DELIVERY.

Redelivery Bond—Sureties—Failure to Justify—Duty of Sheriff—*Mandamus*—Application—Sufficiency.

1. Application for writ of mandate, made to the supreme court, to compel a sheriff to deliver possession of personal property, seized in an action in claim and delivery and thereupon redelivered to defendant upon his furnishing the bond provided for by section 6631, Revised Codes, to plaintiff in such action because of the failure of defendant's sureties to justify, *held*, sufficient as against the contention that it did not show that the relator had exhausted his remedies in the district court, where, though not stating in terms that he had moved that court for an order requiring the officer to perform the duty imposed upon him by section 6632, it did appear therefrom that he had made application for relief and was denied it.—*State ex rel. Johnson v. Collins*, 526.

Failure of Sureties to Justify—Duty of Sheriff—*Mandamus*.

2. *Held*, that where defendant in a claim and delivery action, after seizure of the property by the sheriff, desires a redelivery thereof to himself, he must not only tender to the officer the redelivery bond provided for by section 6632, Revised Codes, but also have the sureties on said bond justify, in the same manner as upon bail on arrest, as a condition precedent to his right to the return of the property, even though exception to their sufficiency is not taken by plaintiff, or notice thereof given to defendant; *held*, further, that defendant in such an action having failed to have the sureties justify, it was the duty of the sheriff, specially enjoined upon him by section 6632 above, to deliver possession to plaintiff, performance of which duty could be compelled by *mandamus*.—*State ex rel. Johnson v. Collins*, 526.

Redelivery Bond—Right to Give—When Waived.

3. Where, in claim and delivery, defendant, at the time the sheriff served the papers and sought to take possession of the property, tendered to the officer a cash bond to retain the property, he thereby waived his right to thereafter tender a redelivery bond.—*State ex rel. Johnson v. Collins*, 526.

COAL MINES.

Accidents in,—see Personal Injuries, 25-27.

CONCLUSIONS.

See Pleading and Practice, 35.

CONFESSIONS.

See Criminal Law, 19.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article	III, section 16...	590
Article	III, section 23.....	571, 572
Article	VIII, section 23.....	102
Article	XII, section 3.....	519
Article	XV, section 5.....	519
Article	XV, section 7.....	55, 519
Article	XV, section 12...	516

CONSTITUTIONAL LAW.

Statutory Construction—Constitutionality.

1. If possible, a statute must be so construed as to uphold its constitutionality.—*State ex rel. Floyd v. District Court*, 357.

Inheritance Taxes—Statute—Constitutionality.

2. *Held*, that the inheritance tax law (Revised Codes, secs. 7724–7751) is not unconstitutional on the ground that it fails to provide for notice to nonresident distributees of the appraisement of the estate for the purpose of fixing the tax.—*State ex rel. Floyd v. District Court*, 357.

CONTEMPT.**Costs—Contemnor not Liable.**

1. That portion of the judgment of conviction for contempt, requiring the contemnors to pay the costs incident to the proceedings, in addition to the fines imposed, was without warrant in law, and therefore unenforceable.—*State ex rel. Edwards v. District Court*, 369.

Violation of Metropolitan Police Law—Evidence—Sufficiency—Supervisory Control.

2. Where, after the mayor of a city had been directed by writ of mandate to reinstate certain policemen in their respective offices from which they had been ousted contrary to the provisions of the Metropolitan Police Law (Revised Codes, secs. 3304–3317), his action in instructing the chief of police to include two special policemen, whose appointment had theretofore been made without warrant of law and whose continued employment would consume the funds available for police purposes to the exclusion of those whose reinstatement had been ordered, among those who were to be regularly employed, constituted sufficient justification for finding him guilty of contempt of court.—*State ex rel. Edwards v. District Court*, 369.

Who may be Guilty of.

3. It was not necessary that aldermen of a city, who, knowing of the issuance of a writ of mandate to the mayor commanding him to reinstate in office certain policemen, theretofore unlawfully removed, and ordering their salaries to be paid, by their concerted action assisted the latter in defeating the purpose of the order of court, should have been parties to the original *mandamus* proceeding or served with the writ, to make punishment for their contumacious conduct in obstructing the administration of the law proper.—*State ex rel. Edwards v. District Court*, 369.

Questions Reviewable—Metropolitan Police Law—Writ of Supervisory Control.

4. In proceedings, under writ of supervisory control, to review the action of the district court in holding that the mayor of a city to whom a writ of mandate had been issued to restore certain policemen to their offices, from which they had been unlawfully ousted by him (Revised Codes, secs. 3304–3317), was not in contempt of court, the only question presented to the appellate court for determination was whether said mayor had actually and in good faith obeyed the order by restoring the officers to their places. Hence the question whether he could, as he did shortly after such restoration, relieve the men from active duty and place them on the eligible list, provided for by the Metropolitan Police Law, *supra*, and other kindred propositions not theretofore presented to the district court for adjudication, were not properly determinable.—*State ex rel. Rowling v. District Court*, 532.

Right to Office—Question not Triable on.

5. The right to exercise the duties of an office cannot be tried summarily in contempt proceedings.—*State ex rel. Rowling v. District Court*, 532.

Evasion of Order—Question Triable.

6. Under proper pleadings, the district court may, in contempt proceedings, determine the question whether the action of the contemnor,

in shortly after literally obeying its order, taking such steps as to bring about the same condition of affairs as that which the order of the court sought to remedy, was a mere subterfuge to evade the law and avoid actual compliance with the order.—State ex rel. Rowling v. District Court, 532.

CONTRACTS.

See, also, Parent and Child, 1-3; Brokers, 1; Cities and Towns, 20, 21.

Place of Payment.

1. In the absence of an agreement on the subject, a debt is payable where the creditor resides, or wherever he may be found.—State ex rel. Coburn v. District Court, 84.

Intent of Parties.

2. What was actually intended by the parties to an agreement at the time they entered into it, becomes as much a part of it as if express provision had been made therefor, if there is not anything in the contract inconsistent therewith.—State ex rel. Coburn v. District Court, 84.

Place of Performance—Venue—Prohibition.

3. The complaint, in an action for wages due, did not in terms allege that under the contract of employment the services were to be performed and payment made for them in B. county; it did set forth, however, that the mine, in which plaintiff alleged he rendered them, was situated in that county, and that upon their rendition defendants became plaintiff's debtors. Defendants interposed a demurrer, and asked for a change of venue to the county of their residence. This motion was denied. Section 6504, Revised Codes, provides that an action on a contract may be tried in the county in which the contract was to be performed. *Held*, under the record as made on application for writ of prohibition to restrain the district court from retaining jurisdiction, that the parties must have intended that the contract should be construed in the light of the rule stated in paragraph 1 above, and that the entire contract, including the making of payment, should be performed in B. county, and that therefore, under section 6504 above, the cause was properly triable in that county.—State ex rel. Coburn v. District Court, 84.

Ambiguity—Construction.

4. Where a contract on its face is ambiguous and uncertain, it must be construed in the light of all the surrounding facts and circumstances bearing upon the transaction.—Alywin v. Morley, 191.

"Quasi Contracts"—Definition.

5. Where one has received money which, though not bound to do so by express contract, he in equity and good conscience ought to turn over to him from whom he received it, the law implies a promise on his part to that effect, and the obligation, thus created or implied by law, is termed a "quasi contract," as distinguished from a contract as defined in sections 4965 and 4966, Revised Codes.—Schaeffer v. Miller, 417.

Not Founded on Writing—"Obligation"—Statute of Limitations.

6. Pending a deal for the purchase of real property, plaintiff paid to defendant \$5,000 on the purchase price. Before the negotiations had ripened into a contract they failed, and defendant returned \$4,000 of the money paid, but refused to turn over the balance. There was not any agreement between them that all the money should be returned to the prospective purchaser in case the transfer was not made. The action to recover the balance of \$1,000 was not brought until more than three years had elapsed after payment of the money to defendant. *Held*, that the action was one upon an

"obligation," within the meaning of subdivision 3 of section 6447, Revised Codes, which provides that an action upon an obligation, not founded upon an instrument in writing other than a contract, etc., must be commenced within three years, and hence was barred under said section.—*Schaeffer v. Miller*, 417.

CONVERSION.

Complaint—Ownership and Possession.

1. In an action for conversion the plaintiff must allege a general or special ownership in the property in controversy, and a right to the immediate possession of it at the time of the conversion.—*Paine et al. v. British-Butte Min. Co.*, 28.

Ownership—Pleadings—Title—Sufficiency—How Determined.

2. Plaintiff in conversion may, in pleading ownership of the property in him at the time of the wrong complained of, set forth the links in his chain of title, and if he follows such statement by a declaration that "thereby" or "by virtue thereof" he became the owner, the sufficiency of such concluding allegation must be tested by the facts set forth in the deraignment of title.—*Paine et al. v. British-Butte Min. Co.*, 28.

Same—Complaint—Deraignment of Title—Sufficiency—How Determined.

3. Where plaintiff in an action in conversion, instead of directly alleging ownership in him at the time of the conversion, merely states facts from which his title may be inferable, title in him must be the inevitable inference from the facts stated, else the complaint is vulnerable to demurrer for ambiguity and uncertainty.—*Paine et al. v. British-Butte Min. Co.*, 28.

Same—Complaint—Insufficiency—Demurrer.

4. *Held*, under the rules stated in paragraphs 2 and 3 above, that the complaint, in an action for the conversion of corporate stock, which, alleging that the owners of the stock had for a valuable consideration transferred and assigned in blank the certificates representing it, "and delivered the same to plaintiffs, who thereby became and were owners and holders thereof," failed to state that any consideration passed from plaintiffs, or that the certificates were delivered with the intent to transfer title to plaintiffs, or that they had been transferred or assigned to them, was demurrable for ambiguity and uncertainty, the allegations being as consistent with the idea of ownership in some third person as with that of ownership in plaintiffs.—*Paine et al. v. British-Butte Min. Co.*, 28.

Complaint—Sufficiency—Certainty.

5. The complaint in an action for the conversion of a steer, a general demurrer to which had been sustained by the trial court, examined and *held* not to be so ambiguous, unintelligible and uncertain as to fail to set forth the plaintiff's cause of action in such language as to enable a person to determine from its reading what the facts relied upon by plaintiff were.—*Carpenter v. Nelson*, 392.

CORPORATE STOCK.

Sale, breach of contract,—see *Brokers*, 1.

Transfer—Pledge—Evidence.

1. Evidence *held* to show, as found by the district court, that a transfer of corporate stock was intended to secure a loan and not as an absolute sale.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

Same—When Considered Pledge, to Secure Loan.

2. Where a transfer of corporate stock had, in its inception, for its purpose a loan and not a sale, the transaction will be held to

have been a pledge, unless it is made to appear that the parties later contracted for an absolute sale.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

Same.

3. In determining whether one, who, while in financial straits, transferred corporate stock to obtain means to relieve his situation (which was known to the transferee), intended the transaction as a pledge or a sale, a court of equity will take into consideration his necessitous condition and be inclined to hold that a pledge was in contemplation, rather than an absolute sale.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

Same—Pledge—Inadequacy of Price.

4. In determining the nature of a transaction alleged to have been an absolute sale of corporate stock, gross inadequacy of price (\$20,000, whereas its value was testified to as from \$75,000 to \$150,000), was a circumstance lending support to the finding of the court that a pledge was intended.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

Same—Pledge—Burden of Proof.

5. Where a transfer of property is absolute on its face, the party asserting that it was intended as security only assumes the burden of showing such fact by clear and satisfactory proof; where, however, there is a contemporaneous agreement to reconvey, the burden is upon him who contends that the instrument was an absolute sale.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

Same—Option to Repurchase—Nature of Transaction.

6. In case of doubt whether a transfer of corporate stock, accompanied by an option to repurchase, was intended as a sale or as security for a loan, courts are inclined to hold in favor of the latter theory.—*Murray v. Butte-Monitor Tunnel Min. Co.*, 449.

CORPORATIONS.

See, also, Statute of Frauds, 1; Corporate Stock.

Actions—Evidence and Procedure—Rules Applicable.

1. When a corporation is suing or being sued, it occupies the same position as a natural person who is *sui juris*; the same rules of evidence and procedure are applicable.—*Johnson v. Butte & Superior Copper Co.*, 158.

Foreign—Increase of Capital Stock—Certificate—Filing Fee—Secretary of State.

2. Each of two foreign corporations, one with a capital stock of \$10,250,000, and the other with one of \$2,000,000, upon entering the state to transact business, had paid the full legal fees for filing its articles of incorporation. Subsequently the former absorbed the latter and increased its capital stock, the certificate presented to the Secretary of State for filing showing its capitalization then to be \$14,000,000. *Held*, that the secretary was not required to deduct the amount of the capital stock of the absorbed corporation—upon which the fees had once been paid—from the amount shown by the certificate of increase, but properly charged a fee based upon the difference between its former capitalization and the present one.—*United Missouri River Power Co. v. Yoder*, 245.

Actions Against—Incorporation—Sufficiency of Complaint.

3. The complaint in an action against a corporation alleging that the defendant was a corporation was sufficient to show that it had the legal capacity to be sued; the failure to allege the place of its incorporation did not render the pleading insufficient.—*Pearce v. Butte Electric Ry. Co.*, 304.

COSTS.

In contempt proceedings,—see Contempt, 1.

Cost Bill—Amendment—Refusal—When Abuse of Discretion.

1. Under section 6589, Revised Codes, granting it power to allow amendments, the district court abused its discretion in refusing to permit an amended memorandum of costs to be filed, in which not any new items were sought to be added to the original, but the sole purpose of which was to furnish the objecting party with information relative to alleged expenditures, the absence of which from the original was claimed to be prejudicial. A showing of inadvertence, surprise or excusable neglect was not necessary in order to warrant the allowance of the amendment.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Amendment, When Considered as Made.

2. Where the district court abused its discretion in refusing an amendment to a cost bill to be filed, the supreme court on appeal will treat it as if it had been filed.—*Neary v. Northern Pacific Ry. Co.*, 480.

COUNTERCLAIMS.

Pleading,—see Garnishment, 3, 4; Accounting, 2.

COUNTIES.

Board of Commissioners—Powers.

1. The board of county commissioners is a body of limited jurisdiction, and before a power may be exercised by it, the authority for the action must be found written in the law, or it must be clearly implied from some express grant of power.—*State ex rel. Gillett v. Cronin*, 293.

Townships—Changing Boundaries—Extent of Power of Board.

2. *Held*, that while the board of county commissioners has the power, under section 2894, Revised Codes, to change the boundaries of a county, or to abolish a township altogether, its authority in this respect is limited to the extent that there must always be at least two townships in each county; hence in abolishing all but one township in a county the commissioners acted in excess of their jurisdiction.—*State ex rel. Gillett v. Cronin*, 293.

CRIMINAL LAW.

Receiving Stolen Property—Information—Contents.

1. As in charging the offense of larceny, so in charging that of receiving stolen property, the information must identify the offense by a description of the things stolen, and state the name of the owner if known.—*State v. Moxley*, 402.

Same—Evidence—Sufficiency.

2. Evidence, circumstantial in character, examined, and *held* to have made out a case from which the jury could find the presence of the three elements essential to establish the offense of receiving stolen property, to wit: (1) That the property in question was stolen; (2) that the defendant bought or received it knowing it to have been stolen; and (3) that he did so for his own gain or to prevent the owner from regaining possession of it. (Revised Codes, sec. 8662.)—*State v. Moxley*, 402.

Same—Information—Ownership—Variance—Failure of Proof.

3. In a prosecution for the crime of receiving stolen property, its ownership must be proved as alleged; hence where the ownership, as laid in the information, was jointly in three persons named, and

the evidence disclosed that most of the articles belonged to one of them, and the remaining ones to the other two individually, there was such a variance as amounted to a failure of proof.—*State v. Moxley*, 402.

Same—Allegation of Value—Surplusage—*Quantum* of Evidence.

4. An information charging the offense of receiving stolen property need not allege its value; where the value is alleged, the allegation may be treated as surplusage. The state's evidence need go no further than to show that the property had some value; and where this was done the fact that it failed to establish that the property was worth as much as stated in the information did not furnish any ground of complaint to defendant.—*State v. Moxley*, 402.

Same—Evidence of Other Like Offenses—Admissibility.

5. While evidence that accused had been implicated in similar transactions with thieves prior to the commission of the offense for which he was on trial was proper for the purpose of showing guilty knowledge on his part, testimony of such dealings had after that date was inadmissible.—*State v. Moxley*, 402.

Same.

6. Testimony that defendant had been guilty of the offense of receiving stolen property on occasions prior to the one for which he was on trial was immaterial in the absence of proof that the property involved in those instances had been stolen.—*State v. Moxley*, 402.

Larceny—Possession of Stolen Property—Correct Instruction.

7. An instruction that evidence of recent possession of stolen property is not in itself sufficient to justify conviction of the crime of larceny correctly stated the law.—*State v. Trosper*, 442.

Grand Larceny—Possession of Stolen Property—Explanatory Evidence—Effect—Erroneous Instruction.

8. In a prosecution for grand larceny the court instructed the jury that "if the defendant offers evidence in explanation of his recent possession of the property in question, it is for the jury to say under all the evidence whether or not such explanatory evidence is reasonable, satisfactory, probable, or true, and whether or not it be sufficient to raise a reasonable doubt of the defendant's guilt." *Held*, that the instruction was erroneous in that (a) under it the jury were authorized, after finding the explanation to be true, to proceed to determine whether such true explanation raised a reasonable doubt of his guilt, whereas, if found true, the only course open to the jury was to return a verdict of not guilty; and (b) if the explanation raised a reasonable doubt in their minds, it was immaterial whether it was reasonable, probable, satisfactory or true; in that event he was also entitled to an acquittal.—*State v. Trosper*, 442.

Same—Livestock—Identity—Evidence—Sufficiency.

9. On the question of the identity of a heifer charged to have been stolen by defendant, evidence which showed that the animal was branded with the prosecuting witness' brand; that it was of the same breed and general description as the latter's cattle; that the alleged owner had not sold any livestock of the character of the one in question for ten years prior to the taking; that the animal was afterward found near the range where his cattle pastured, and that there was not anyone else in that section of the country who used the same or a similar brand—*held* sufficient to go to the jury.—*State v. Trosper*, 442.

Railroads—Trainmen—Hours of Labor—Violation of Statute—Evidence—Insufficiency.

10. Evidence *held* insufficient to support a verdict finding the defendant railway company guilty of a violation of the provisions of sections 1741 and 1742, Revised Codes, prohibiting railroads from requiring their trainmen to work for more than sixteen consecutive hours.—*State v. Northern Pacific Ry. Co.*, 557.

Circumstantial Evidence—Quantum of Proof.

11. Where circumstantial evidence is relied upon to convict of crime, the circumstances must be not only consistent with defendant's guilt, but inconsistent with any other reasonable hypothesis.—*State v. Northern Pacific Ry. Co.*, 557.

Conviction—When Evidence Insufficient.

12. To sustain a conviction in a criminal prosecution, there must be some substantive testimony. Mere suspicions or probabilities, however strong, are insufficient.—*State v. Northern Pacific Ry. Co.*, 557.

Presumptions—Innocence of Accused.

13. Every presumption is in favor of the innocence of one accused of crime.—*State v. Northern Pacific Ry. Co.*, 557.

Instructions—Law of the Case—Jury must Obey.

14. The court's instructions to the jury are the law of the case, and a verdict in conflict therewith will, on appeal, be set aside as against law.—*State v. Northern Pacific Ry. Co.*, 557.

Jury Trial—Extent.

15. In a criminal action the defendant cannot object that a particular juror was not allowed to sit in his case on a challenge for cause; his right being only that he shall be tried by an impartial jury as provided by Constitution, Article III, section 16.—*State v. Byrd*, 585.

Preliminary Examination—Waiver—Effect.

16. A voluntary waiver of a preliminary examination by defendant charged with homicide has the same legal effect as though a hearing was had.—*State v. Byrd*, 585.

Information—Leave to File.

17. Under Revised Codes, section 8927, providing that prosecutions in the district court must be by information, and section 8928, providing that applications for leave to file an information before examination and commitment must be made to the court on written motion by the county attorney, it is only where there has been no examination or commitment by a magistrate that the county attorney must move for leave to file an information.—*State v. Byrd*, 585.

Evidence—Harmless Error.

18. Where a witness testified that he took a pistol from defendant's hand after he had shot and killed a man, but was unable to positively identify the one shown him at the trial, its admission in evidence over objection was not prejudicial to the defendant where its identity was not questioned.—*State v. Byrd*, 585.

Admission by Accused—Whether Voluntary.

19. A witness in a prosecution for murder testified that defendant when brought to the jail made an admission as to the shooting, and to an alternative question whether defendant's admission was voluntary, or was the result of threats, fear, etc., answered in the negative. Over objection the witness testified to what defendant had said. *Held*, that the state had made a *prima facie* showing that such admission was voluntary.—*State v. Byrd*, 585.

Evidence—State of Mind of Accused.

20. The question whether witness noticed defendant, "whether he appeared to be scared or not," calls for a statement of fact, or a "short-

hand rendering of facts," and is not objectionable as asking for a conclusion by the witness.—State v. Byrd, 585.

Appeal—Harmless Error—Prejudice—Presumptions.

21. It is for the court to determine whether an error affects the substantial rights of the parties in view of Revised Codes, section 9415, requiring the supreme court to give judgment irrespective of technical errors or defects not involving substantial rights, and it ought no longer to be the rule in criminal cases in this state that where error is shown prejudice will be presumed.—State v. Byrd, 585.

Appeal—Exclusion of Evidence—Offer of Proof.

22. The burden of showing prejudice from the erroneous exclusion of evidence lies on appellant, and hence where, on a trial for homicide, the court improperly excluded, as calling for a conclusion, a question to a witness whether he noticed if defendant appeared to be scared as deceased advanced upon him, and defendant made no offer to show that the witness would have answered that defendant did seem scared, the supreme court cannot presume that he would have so answered so as to make the ruling prejudicial error.—State v. Byrd, 585.

Homicide—Self-defense—Burden of Proof.

23. Under the express provisions of Revised Codes, section 9282, upon trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it is on the defendant, unless the proof for the prosecution tends to show that the crime committed is only manslaughter, or that defendant was justified or excusable.—State v. Byrd, 585.

Same—Self-defense—Instructions.

24. In a prosecution for murder, where defendant claimed to have acted in self-defense, the jury was instructed that if it believed from the evidence that defendant unlawfully killed a person named, by shooting him with a pistol, "and that such killing was not in necessary self-defense, and was not under such circumstances as to be justifiable as defined in these instructions, then the defendant is guilty of murder, in the first degree." Appropriate instructions as to manslaughter were also given. *Held*, that this instruction, read with another instruction in the words of the statute, was sufficiently plain, upon the distinction between murder and manslaughter, to be understood by the jury.—State v. Byrd, 585.

Same—Self-defense—Instructions.

25. An instruction that "no man is justified in taking a human life to repel a mere battery," read with another instruction as to what circumstances will justify homicide, *held* to include all the degrees of battery making homicide justifiable.—State v. Byrd, 585.

Same—Dying Declarations—Weight—Questions for Jury.

26. The jury are the judges of the weight and credibility of dying declarations, and, such declarations being in the nature of hearsay testimony, the jury must consider whether a declaration introduced in evidence is in the exact words of the deceased, and whether it correctly expresses his meaning.—State v. Byrd, 585.

Same—Self-defense—Apprehension of Danger.

27. An instruction, "If you believe the deceased was attempting to do some great bodily injury to the defendant, and defendant took the life of deceased in resisting such attempt, the homicide is justifiable. * * * The great bodily injury mentioned * * * is not limited to such an injury as would constitute a felony, but an unlawful beating at the hands of the assailant may be sufficient"—*held*, properly refused as ignoring the right of defendant as a reasonable man to act upon appearances as they were presented to him.—State v. Byrd, 585.

Same—Dying Declarations—Written Declarations Read to Declarant.

28. Where deceased made an oral statement in the nature of a dying declaration, no other witnesses being present who knew what had taken place, and such statement was reduced to writing and signed by the deceased, and two witnesses to the making of the declaration testified that it was the statement he made, it was admissible in evidence, although it was not in the handwriting of deceased, and was not read over to him before he signed it.—State v. Byrd, 585.

Same—"Dying Declarations"—Condition of Declarant.

29. The rule requiring proof that statements offered as "dying declarations" were made by declarant when in *extremis* does not require that it be shown that they were made while he was literally breathing his last, but is satisfied when it is shown that the declarant died from the wound from which he was suffering at the time they were made, and that such wound was the direct and proximate result of the act which the declarations tend to describe.—State v. Byrd, 585.

Same—Dying Declarations—Sworn to—Effect.

30. The fact that a dying declaration was sworn to does not render it inadmissible.—State v. Byrd, 585.

Same—Dying Declarations—Subsequent Operation.

31. That an operation was performed upon a wounded man after declarations offered as his dying declarations were made, *held*, in view of the other evidence, not to affect the admissibility of such declarations.—State v. Byrd, 585.

Same—Appeal—Verdict—Conclusiveness.

32. Where the evidence in a prosecution for homicide supported the conviction for murder in the second degree, the supreme court will not interfere, though on the evidence they would either have acquitted on the ground of self-defense or at most convicted of manslaughter.—State v. Byrd, 585.

CROSS-BILLS.

See Pleading and Practice, 11.

DAMAGES.**Measure of Damages—Personal Injuries—Mortality Tables—Instructions.**

1. Instructions on the measure of damages in a personal injury action, which told the jury that if plaintiff's capacity to earn money had been reduced by reason of his injuries, they should award such a sum as would purchase an annuity equal to the difference in the amount he could earn annually in his then condition, and the amount he could have earned if he had not been injured, having due regard to diminished earning capacity due to advancing age, etc., and that mortality and annuity tables were not to be considered as an absolute basis for their calculations, but should be used as a guide only so far as the facts before them corresponded to those from which the tables were computed, correctly stated the law.—Moyse v. Northern Pacific Ry. Co., 272.

Evidence—Sufficiency—Verdict.

2. Evidence relative to plaintiff's damages *held* to furnish some tangible basis for an estimate by the jury, and that while the verdict was for an amount much less than that fixed by the only witness who testified in relation thereto, it should not be set aside on the ground that there was no evidence to support it.—Wahle v. Great Northern Ry. Co., 326.

Brokers—Sale of Corporate Stock—Breach of Contract—Measure of Damages.

3. Where, after the breach of an agreement to purchase certain shares of stock from plaintiff brokers, under the terms of which

defendants were bound to receive and pay for the same within a stipulated number of days, at which time title should pass, plaintiffs sold the stock in open market at the best available price, the measure of damages was the difference between the price fixed in the contract and the value of the shares to the seller—such value to be determined as provided in section 6081, Revised Codes.—*Welch v. Nichols*, 435.

DEATH.

Actions to recover damages for death occasioned by negligence,—see *Personal Injuries*, 11, 12, 25–27, 31–48.

DEBT.

Place of payment,—see *Contracts*, 1.

DECLARATIONS.

See *Dying Declarations*.

DEDICATION.

See *Cities and Towns*, 1.

DEFAULT JUDGMENTS.

See *Judgments*, 3.

DEFENSES.

Pleading inconsistent defenses,—see *Pleading and Practice*, 9.

To enforcement of promissory notes,—see *Promissory Notes*, 1.

To violation of civil service statute, by city authorities,—see *Cities and Towns*, 27.

DEFINITIONS.

See *Words and Phrases*.

DEMAND.

When unnecessary,—see *Pleading and Practice*, 31, 32.

DEMURRER.

See, also, *Conversion*, 3, 4.

Grounds—When Ruling Affirmed.

1. An order of the district court, general in terms, sustaining a demurrer which attacked the complaint on several grounds, will be upheld on appeal if justifiable upon any one of the grounds urged.—*Paine et al. v. British-Butte Min. Co.*, 28.

Complaint—Ambiguity—Special Demurrer.

2. Ambiguity in a complaint can be reached by special demurrer only.—*Wahle v. Great Northern Ry. Co.*, 326.

Same—When Proof Against General Demurrer.

3. The rule that if, upon the facts alleged in the complaint, the plaintiff is entitled to the relief demanded, or to any relief, the pleading is proof against a general demurrer, applies also to each count of the complaint.—*Salem v. Connecticut Fire Insurance Co.*, 351.

DEPOSITIONS.

Fees for taking,—see *Notaries Public*, 1.

DISCRETION.

Trial—Special Interrogatories.

1. The submission of special interrogatories to the jury is a matter confided to the discretion of the district court.—*Poor, Admr., v. Madison River Power Co.*, 236.

Pleadings—Amendment During Trial.

2. The allowance of an amendment to defendant's answer, during trial, was within the sound legal discretion of the district court; in the absence of a showing of abuse thereof, its action will not be disturbed on appeal.—*Giovanetti v. Schab*, 297.

New Trial Order—Insufficiency of Evidence.

3. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the discretion of the trial court; its action thereon will not be disturbed on appeal unless it is manifest that such discretion has been abused.—*Welch v. Nichols*, 436.

Cost Bill—Amendment—Refusal—When Abuse of Discretion.

4. Under section 6589, Revised Codes, granting it power to allow amendments, the district court abused its discretion in refusing to permit an amended memorandum of costs to be filed, in which not any new items were sought to be added to the original, but the sole purpose of which was to furnish the objecting party with information relative to alleged expenditures, the absence of which from the original was claimed to be prejudicial. A showing of inadvertence, surprise or excusable neglect was not necessary in order to warrant the allowance of the amendment.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Amendment, When Considered as Made.

5. Where the district court abused its discretion in refusing an amendment to a cost bill to be filed, the supreme court on appeal will treat it as if it had been filed.—*Neary v. Northern Pacific Ry. Co.*, 480.

Cities and Towns—Sidewalks—Legislative Powers of Council.

6. In the absence of an allegation that the city council, in ordering a wooden sidewalk to be replaced by a concrete walk, abused its discretion or was guilty of fraud, a finding that such walk did not need replacing was immaterial, since the council's action in the premises was in the exercise of a legislative function, and subject to judicial review only for fraud or abuse of discretion.—*O'Brien v. Drinkenberg*, 538.

Injunction *Pendente Lite*.

7. The granting of an injunction *pendente lite* lies within the sound discretion of the trial court, subject to reversal only in case of manifest abuse of such discretion.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 551.

Cities and Towns—Reduction in Force of Firemen.

8. Under section 3329, Revised Codes, the city council must, if it deems it necessary to reduce the number of paid firemen, retire the one last appointed, and may not exercise any discretion in the premises and discharge the one thought least efficient, even though oldest in point of service.—*State ex rel. Drifill v. City of Anaconda*, 577.

DISMISSAL.

Of action by supreme court, on appeal,—see *Appeal and Error*, 5.

DISTRICT COURTS.

Jurisdiction in probate proceedings,—see *Wills*, 4, 5; *Probate Proceedings*, 1.

Discretion,—see *Discretion*, 1-5, 7.

DIVORCE.

Suit Money—Burden of Proof.

1. Defendant in an action for divorce was not bound to show affirmatively, on her application to have plaintiff pay into court money sufficient to defray costs already incurred and those to be incurred in presenting her motion for a new trial, that the application was made in good faith and that there was a probability of her ultimate success in the litigation, before the court could properly act upon it. *Rumping v. Rumping*, 33.

New Trial—Grounds.

2. While the district court in adopting the findings of the jury and making special findings of its own, in favor of plaintiff in a divorce suit, necessarily passed adversely on the grounds specified by defendant in her notice of intention to move for a new trial, to-wit, that the evidence was insufficient to justify the findings and decision of the court, and that the decision was against law, it could nevertheless again pass upon them in considering the motion.—*Rumping v. Rumping*, 33.

Suit Money—Necessity—Proof.

3. On her application for suit money in an action for divorce, the movant must show a necessity for the allowance asked; if she has sufficient means of her own to meet the costs of suit, the application should be denied.—*Rumping v. Rumping*, 33.

Same—Allowance—When Error.

4. It was error to allow the wife a larger amount of suit money, in an action for divorce, than the testimony showed was necessary for the purpose to which it was to be applied.—*Rumping v. Rumping*, 33.

DYING DECLARATIONS.

See Criminal Law, 26, 28-31.

EASEMENTS.

See Real Property.

EJECTMENT.

See Mines and Mining, 5-9.

ELECTRICITY.

See Personal Injuries, 12.

EQUITY.

Review of findings in equity cases,—see Appeal and Error, 1.

Review of rulings on evidence,—see Appeal and Error, 4.

Transfer of personal property, whether pledge or sale,—see Corporate Stock, 1-6.

ESTATES OF DECEASED PERSONS.

See Probate Proceedings; Inheritance Taxes; Wills.

ESTOPPEL IN PAIS.

Cities and Towns—Streets—Dedication.

1. Where defendant city had for more than twenty years permitted plaintiff to remain in undisturbed possession of, and put permanent improvements upon, a piece of land, after an alleged dedication of a portion thereof for street purposes, and great injury would result to

plaintiff's premises from the opening of a street through them, the doctrine of estoppel *in pais* is applicable, and the city may not be heard to assert its right to devote to public use, without compensation to the owner, the portion of the property desired for street purposes.—*Von Tobel v. City of Lewistown*, 226.

Dumping Sawdust into Streams—Injunction.

2. *Obiter*: If plaintiff mining company was estopped to deny the right of defendants to maintain or operate a sawmill upon a portion of its mining claim, because plaintiff had stood by silent while they expended large sums of money in erecting it and a dam in connection therewith [a question raised, but *held* immaterial on appeal from an order granting an injunction *pendente lite*], it cannot be said to be estopped to deny the right of defendants to operate it in a manner destructive of its rights in the premises, since it had a right to assume that the sawmill operations would be carried on so as not to create a nuisance.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 551.

EVIDENCE.

Review of rulings in admitting or rejecting evidence in equity cases,—see Appeal and Error, 4, 12.

Admissibility of minute entry of district court,—see Appeal and Error, 17.

Admissibility—Pleading—Review.

1. Where evidence was admitted without objection, the question whether its introduction was warranted by the pleadings will not be considered on appeal.—*Archer et al. v. Chicago, M. & St. P. Ry. Co.*, 56.

Conflicting Evidence—Verdict—Conclusiveness.

2. Where, in an action at law, the testimony is conflicting in substantial particulars, the verdict of the jury will not be disturbed on appeal under an assignment that the evidence is insufficient to justify it.—*Murphy et al. v. Cooper*, 72; *Poor, Admr., v. Madison River Power Co.*, 236.

Corporations—Rules of Evidence and Procedure Applicable.

3. When a corporation is suing or being sued, the same rules of evidence and procedure are applicable as in actions between natural persons.—*Johnson v. Butte & Superior Copper Co.*, 158.

Admissions in Pleadings—Admissibility in Evidence.

3a. Since under section 6565, Revised Codes, pleadings must be verified, admissions in an answer are properly admissible in evidence; and the plaintiff in offering such evidence need not embrace in his offer the entire answer, nor is he estopped from denying or disproving statements contained in the pleading.—*Johnson v. Butte & Superior Copper Co.*, 158.

Nonsuit—Evidence of Plaintiff—How Viewed.

4. Upon a motion for a nonsuit the plaintiff is entitled to have his evidence considered in the light most favorable to him.—*Johnson v. Butte & Superior Copper Co.*, 158; *McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

Personal Injuries—Evidence—Causal Connection.

5. In personal injury cases the evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury.—*Bracey v. Northwestern Improvement Co.*, 338.

Criminal Law—Receiving Stolen Property—Allegation of Value—*Quantum* of Proof.

6. An information charging the offense of receiving stolen property need not allege its value; where the value is alleged, the allegation

may be treated as surplusage. The state's evidence need go no further than to show that the property had some value; and where this was done the fact that it failed to establish that the property was worth as much as stated in the information did not furnish any ground of complaint to defendant.—*State v. Moxley*, 402.

Same—Evidence of Other Like Offenses—Admissibility.

7. While evidence that accused had been implicated in similar transactions with thieves prior to the commission of the offense for which he was on trial was proper for the purpose of showing guilty knowledge on his part, testimony of such dealings had after that date was inadmissible.—*State v. Moxley*, 402.

Same—When not Admissible.

8. Testimony that defendant had been guilty of the offense of receiving stolen property on occasions prior to the one for which he was on trial was immaterial in the absence of proof that the property involved in those instances had been stolen.—*State v. Moxley*, 402.

Hypothetical Questions—Contents.

9. A hypothetical question need not comprehend all the evidence on the subject to which the question relates.—*Townsend v. City of Butte*, 410.

Exclusion of—Absence of Offer of Proof.

10. Where the testimony of a witness was presented in the record in narrative form, and there appeared therein not any question or offer of proof to suggest what evidence the witness might have given in reply to an interrogatory the answer to which was excluded, the supreme court will not determine whether the trial court erred in its ruling.—*Cassidy v. Slemons & Booth*, 426.

Erroneous Exclusion of—Error Cured by Subsequent Admission.

11. Error in excluding evidence is cured by the subsequent admission of testimony eliciting substantially the information sought in the first instance.—*Cassidy v. Slemons & Booth*, 426.

Mines—Safety Cages—Absence of Doors—Evidence—Admissibility.

12. Even though, under section 8536, Revised Codes, mining cages, when used in sinking a shaft, need not be equipped with doors, and plaintiffs did not claim any right to recover on account of their absence from the one between which and the wall plates of the shaft deceased was caught while being hoisted, evidence of their absence was nevertheless competent as bearing upon the degree of care required of the engineer, through whose negligence the accident was alleged to have occurred, in lowering and hoisting the cage.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Criminal Law—Circumstantial Evidence—*Quantum* of Proof.

13. Where circumstantial evidence is relied upon to convict of crime, the circumstances must be not only consistent with defendant's guilt, but inconsistent with any other reasonable hypothesis.—*State v. Northern Pacific Ry. Co.*, 557.

Same—Conviction—When Evidence Insufficient.

14. To sustain a conviction in a criminal prosecution, there must be some substantive testimony. Mere suspicions or probabilities, however strong, are insufficient.—*State v. Northern Pacific Ry. Co.*, 557.

Same—Exclusion of Evidence—Offer of Proof.

15. The burden of showing prejudice from the erroneous exclusion of evidence lies on appellant, and hence where, on a trial for homicide, the court improperly excluded, as calling for a conclusion, a question to a witness whether he noticed if defendant appeared to be scared as deceased advanced upon him, and defendant made no

offer to show that the witness would have answered that defendant did seem scared, the supreme court cannot presume that he would have so answered so as to make the ruling prejudicial error.—*State v. Byrd*, 585.

FEEES.

Attorney's fees,—see Attorneys, 1.

For filing certificate of increase of capital stock of foreign corporations.—see Corporations, 2.

FELLOW-SERVANTS.

Mines—Shift-boss.

1. A shift-boss in a mine whose duty extends no further than to guide and direct the employees under him in the performance of the particular work in which he is engaged with them, is, under the common-law rule, a fellow-servant of his coemployees.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Same—Negligence—Fellow-servants—Evidence—Sufficiency.

2. Evidence, circumstantial in character, *held* sufficient to warrant submission of the case to the jury on the question whether injuries to a mine employee were caused through the mishandling of a hoisting engine by the engineer, his fellow-servant, so as to make defendant mining company liable under Chapter 23 of the Laws of 1905, page 51.—*Beeler v. Butte & London C. Dev. Co.*, 465.

FINDINGS.

Review of, in equity cases,—see Appeal and Error, 1.

Power to Make—Scope.

1. A court may not go outside the issues and make findings upon questions not in dispute.—*O'Brien v. Drinkenberg*, 538.

FIRE DEPARTMENT.

Unlawful removal of member of,—see Cities and Towns, 22-27.

FIRE INSURANCE.

See Insurance 6, 7.

GARNISHMENT.

Rights of Garnishee—Payment of Claims.

1. Where the buyer of certain property had, as per agreement between the parties, retained a part of the purchase price with which to pay outstanding liens, and did pay full value for certain of the claims, it was subsequently, when sued as garnishee, properly given credit for the full amount of such claims, though the claimants received only a portion of the sums due, the evidence being silent as to who received the balance.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Payment of Claims by Garnishee—Delay.

2. The garnishee mentioned in the foregoing paragraph, having permitted a judgment foreclosing one of the liens which it had agreed to pay out of the purchase money retained by it, to remain unpaid for nearly a year after rendition, was only entitled to credit for the amount of the judgment, and not to the costs, expenses and interest due to delay in paying the claim; if it had any excuse for not making payment before, the burden was upon it to show that it was entitled to credit in a greater amount.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Pleadings—Counterclaim.

3. In a suit against a garnishee by the attaching creditor, the former cannot assert a counterclaim under a general denial of indebtedness; to make it available, such counterclaim must be specially pleaded.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Pleadings—Bill of Particulars.

4. The furnishing of a bill of particulars in which a garnishee had listed a claim as a setoff against the attaching creditor's demand, did not constitute a pleading of a counterclaim.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Unauthorized Payment of Claims by Garnishee.

5. At the time of the sale of a telegraph and telephone plant the parties stipulated that the sum of \$20,000 should be deposited in a bank, said sum to be by the bank applied to the payment of the seller's outstanding bonds, the latter to pay all expenses incident to their redemption. It was also provided that the buyer should retain a certain amount of the purchase price for the purpose of paying off a number of liens on the property. *Held*, in a suit by an attaching creditor against the buyer, as garnishee, that the garnishee was not entitled to an allowance for expenses in discharging the bonds, but that the authority to pay the \$20,000 for the purpose indicated was an implied prohibition against the expenditure of any greater amount.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Same.

6. Evidence *held* insufficient to support a finding that under a parol agreement, made immediately subsequent to the contract relative to the payment of outstanding liens (mentioned in the above paragraphs), the garnishee was entitled to credit for amounts paid in satisfaction of claims which were not liens against the property bought by it.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Uncertainty of Amount of Debt.

7. While a garnishee is not chargeable on a contingent liability or a conditional contract merely, he may be held if his liability is certain, and the only uncertainty which exists is as to the amount thereof. *Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

GRAND LARCENY.

See Criminal Law, 7-9.

HARMLESS ERROR.

Amendment of pleadings after judgment,—see Pleading and Practice, 28; Instructions, 2.

Admission or exclusion of evidence,—see Appeal and Error, 19, 26.

Criminal Law—Error—Prejudice—Presumptions.

1. In criminal cases it is no longer the rule in this state that where error is shown, prejudice will be presumed.—*State v. Byrd*, 585.

HOMICIDE.

See Criminal Law, 15-32.

HOURS OF LABOR.

Violation of statute fixing,—see Criminal Law, 10.

HYPOTHETICAL QUESTIONS.

See Evidence, 9.

IDENTITY.

Of stolen property,—see Criminal Law, 9.

INFORMATION.

Charging offense of receiving stolen property,—see Criminal Law, 3, 4.

Leave to file,—see Criminal Law, 17.

INHERITANCE TAXES.

Estates—Nonresident Decedents.

1. *Held*, that where administration of the estate of a nonresident testator is ancillary only, and, in order to distribute it under the terms of the will, it is necessary that it be delivered to the executor in the jurisdiction in which the decedent resided at the time of his death, the inheritance tax provided for by section 7724, Revised Codes, must be collected upon the amount so delivered.—State ex rel. Floyd v. District Court, 357.

Statute—Constitutionality.

2. *Held*, that the statute providing for an inheritance tax (sections 7724–7751) is not unconstitutional on the alleged ground that it fails to provide for notice to nonresident distributees of the appraisement of the estate for the purpose of fixing the tax, but that under sections 7738 and 7741, such a reasonable notice is provided, and an opportunity to be heard given, as not to leave the legislation open to the objection that it fails to provide due process of law.—State ex rel. Floyd v. District Court, 357.

INJUNCTION.

Complaint,—see Pleading and Practice, 35.

Injunction *Pendente Lite*—Evidence—Sufficiency—Discretion.

1. It is not essential to the validity of an order granting an injunction *pendente lite* that the evidence in support thereof should be of such character as to warrant permanent injunctive relief in plaintiff's favor at the trial upon the merits. The granting of such an order lies within the sound discretion of the trial court, subject to reversal only in case of manifest abuse of such discretion.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 551.

Same—Evidence—Sufficiency.

2. Evidence introduced in an action in which the district court granted an injunction *pendente lite* restraining the defendants from dumping sawdust into a stream, or upon its banks, causing interference with plaintiff's placer mining operations, *held* not to show a preponderance against the trial court's finding in favor of plaintiff's contention, so as to justify a reversal of the court's order.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 551.

Same—Dumping Sawdust into Streams—Estoppel *in Pais*.

3. *Obiter*: If plaintiff mining company was estopped to deny the right of defendants to maintain or operate a sawmill upon a portion of its mining claim, because plaintiff had stood by silent while they expended large sums of money in erecting it and a dam in connection therewith [a question raised, but *held* immaterial on appeal from an order granting an injunction *pendente lite*], it cannot be said to be estopped to deny the right of defendants to operate it in a manner destructive of its rights in the premises, since it had a right to assume that the sawmill operations would be carried on so as not to create a nuisance.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 551.

INSTRUCTIONS.

Appeal—Objections and Exceptions—Review.

1. Under subdivision 5 of section 6746, Revised Codes, the supreme court cannot reverse a judgment and direct a new trial for error in an instruction, unless at the time of settlement in the trial court specific objection was made to it, pointing out the error alleged, and an exception preserved to the action of the court in overruling the objection.—*Poor, Admr., v. Madison River Power Co.*, 236.

Personal Injuries—Conformity to Issues—Harmless Error.

2. Though the district court erred, in an action to recover damages for the death of an employee occasioned by coming in contact with a highly charged electric wire, in submitting an instruction upon an issue of negligence not involved in the case as tried, such error was nonprejudicial to defendant, in view of the fact that the instruction placed an additional burden upon plaintiff which, under the theory of the case, he was not bound to assume.—*Poor, Admr., v. Madison River Power Co.*, 236.

Same—Measure of Damages—Mortality Tables.

3. Instructions on the measure of damages in a personal injury action, which told the jury that if plaintiff's capacity to earn money had been reduced by reason of his injuries, they should award such a sum as would purchase an annuity equal to the difference in the amount he could earn annually in his then condition, and the amount he could have earned if he had not been injured, having due regard to diminished earning capacity due to advancing age, etc., and that mortality and annuity tables were not to be considered as an absolute basis for their calculations, but should be used as a guide only so far as the facts before them corresponded to those from which the tables were computed, correctly stated the law.—*Moyse v. Northern Pacific Ry. Co.*, 272.

When Refusal Proper.

4. The refusal of an instruction, the subject matter of which was covered by one given, was not error.—*Townsend v. City of Butte*, 410.

Abstract Propositions of Law.

5. District courts, in charging juries, should not submit to them abstract propositions of law without an effort to make such propositions directly applicable to the facts of the particular case before them for trial.—*State v. Trosper*, 442.

Criminal Law—Grand Larceny—Possession of Stolen Property—Explanatory Evidence—Effect—Erroneous Instruction.

6. In a prosecution for grand larceny the court instructed the jury that "if the defendant offers evidence in explanation of his recent possession of the property in question, it is for the jury to say under all the evidence whether or not such explanatory evidence is reasonable, satisfactory, probable, or true, and whether or not it be sufficient to raise a reasonable doubt of the defendant's guilt." *Held*, that the instruction was erroneous in that (a) under it the jury were authorized, after finding the explanation to be true, to proceed to determine whether such true explanation raised a reasonable doubt of his guilt, whereas, if found true, the only course open to the jury was to return a verdict of not guilty; and (b) if the explanation raised a reasonable doubt in their minds, it was immaterial whether it was reasonable, probable, satisfactory or true; in that event he was also entitled to an acquittal. *State v. Trosper*, 442.

Restricting Use of Evidence—When Appellant may not Object.

7. An instruction which, in restricting the use of certain evidence, had the effect of protecting appellant company's rights, was not open to objection by it.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Law of the Case.

8. Since a decision of the supreme court, whether right or wrong, is the law of the case on a second trial, an instruction couched in language substantially the same as that used by that court in disposing of one of appellant's contentions was properly given on the retrial.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Jury must Obey.

9. The court's instructions to the jury are the law of the case, and a verdict in conflict therewith will, on appeal, be set aside as against law.—*State v. Northern Pacific Ry. Co.*, 557.

Homicide—Self-defense.

10. In a prosecution for murder, where defendant claimed to have acted in self-defense, the jury was instructed that if they believed from the evidence that defendant unlawfully killed a person named, by shooting him with a pistol, "and that such killing was not in necessary self-defense, and was not under such circumstances as to be justifiable as defined in these instructions, then the defendant is guilty of murder, in the first degree." Appropriate instructions as to manslaughter were also given. *Held*, that this instruction, read with another instruction in the words of the statute, was sufficiently plain, upon the distinction between murder and manslaughter, to be understood by the jury.—*State v. Byrd*, 585.

Same.

11. An instruction that "no man is justified in taking a human life to repel a mere battery," read with another instruction as to what circumstances will justify homicide, *held* to include all the degrees of battery making homicide justifiable.—*State v. Byrd*, 585.

Same—Self-defense—Apprehension of Danger.

12. An instruction, "If you believe the deceased was attempting to do some great bodily injury to the defendant, and defendant took the life of deceased in resisting such attempt, the homicide is justifiable. * * * The great bodily injury mentioned * * * is not limited to such an injury as would constitute a felony, but an unlawful beating at the hands of the assailant may be sufficient"—*held*, properly refused as ignoring the right of defendant as a reasonable man to act upon appearances as they were presented to him.—*State v. Byrd*, 585.

INSURANCE.

Accident Insurance—Notice and Proof of Death.

1. While the giving of notice and the furnishing of proof of death, called for by the provisions of an accident insurance policy, are distinct and separate acts, proof of death, when seasonably made, may also serve the purpose of notice; but a mere informal notice does not ordinarily supply the place of formal proof.—*Da Rin, Admr., v. Casualty Company of America*, 175.

Same—Proof of Death—Evidence—Nature and Sufficiency.

2. The proof of death required to be made by the terms of a policy of accident insurance need not consist of formal depositions or sworn statements of eyewitnesses, but evidence in any form, when substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liabilities under his contract, is sufficient, and it is for the court, and not for the insurer, to say whether it gives substantially the information stipulated for in the policy.—*Da Rin, Admr., v. Casualty Company of America*, 175.

Same—Notice and Proof of Death—Sufficiency—Waiver.

3. When notice of a casualty and proof of resulting death are incorporated in the same communication to the insurer, and the proof of the cause of death, with the attendant facts, meets all the requirements of the policy, except that the statement is not as full as it might be, the failure of the insurer to demand more explicit proof is a waiver of his right to thereafter object to its sufficiency.—*Da Rin, Admr., v. Casualty Company of America*, 175.

Same—Attempt to Save Life—Negligence.

4. The law will not impute negligence to one who, in an attempt to save human life, is injured, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons.—*Da Rin, Admr., v. Casualty Company of America*, 175.

Same—Attempt to Save Life—Exposure to Unnecessary Danger—Jury Question.

5. *Held*, that the question whether the death of a miner who, while attempting to rescue a fellow-workman who had been overcome by noxious gases, was himself overcome and died from the effects of the inhalation of such gases, resulted from an unnecessary exposure to danger so as to absolve the defendant company from liability under a provision in its contract of insurance, was one for the jury.—*Da Rin, Admr., v. Casualty Company of America*, 175.

Fire Insurance—Arbitration—Effect.

6. Where the parties to a contract of fire insurance upon destruction of the property agree to submit the amount of loss to arbitration, the award fixes the amount of loss sustained and is binding upon both parties; so that the insured cannot maintain an action upon the policy and have a readjustment of the loss, without first having the award set aside.—*Solem v. Connecticut Fire Insurance Co.*, 351.

Same—Defenses—False Statements—Pleading.

7. The defense that a policy of fire insurance became void under one of its provisions because of false statements made by the insured in the proof of loss, must be pleaded, otherwise it will be deemed waived; and the fact that defendant company did not become aware of the falsity of such statements until trial was not any excuse for failure to interpose an appropriate plea, since leave to amend its answer might then have been asked.—*Solem v. Connecticut Fire Insurance Co.*, 351.

JOINDER OF PARTIES.

See Parties.

JUDGMENTS.

Entry of,—see New Trial, 3.

Judgment on Directed Verdict—Nature of.

1. A judgment on a directed verdict may or may not be a judgment on the merits, dependent upon the question decided by the court and the scope of the ruling.—*Dunseth v. Butte Electric Ry. Co.*, 14.

Same—*Res Adjudicata*.

2. Plaintiff brought an action in the circuit court of the United States against a street railway company to recover damages for personal injuries. The judgment in that court recited that, after the impaneling of a jury, evidence was submitted by both parties, and at its conclusion a verdict was directed in favor of defendant. Plaintiff subsequently instituted suit in the state court on the same cause of action against the same defendant. *Held*, that the judgment in the federal court was upon the merits, and a bar to the action in the state court.—*Dunseth v. Butte Electric Ry. Co.*, 14.

Default Judgment—Absence of Formal Prayer for Judgment—Scope of Relief.

3. Where the complaint in a personal injury action, to which defendant failed to answer, contained language showing the limits of plaintiff's claim, to-wit: That he had been damaged in a certain sum—the absence of a formal prayer for judgment did not deprive the court of power to enter judgment. The defendant could not have been misled by the language employed; it served the same practical purpose as a formal prayer, and was sufficient.—*Pearce v. Butte Electric Ry. Co.*, 304.

Judgment in Excess of Verdict—Modification.

4. Where the judgment in an action at law awards a larger measure of relief than is warranted by the verdict, it will be modified on appeal to conform to the verdict, a new trial not being necessary for that purpose.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

JURISDICTION.

Action on contract, triable where,—see *Contracts*, 3.

Of district courts in probate proceedings,—see *Wills*, 4, 5; *Probate Proceedings*, 1.

Of supreme court to dismiss action on appeal,—see *Appeal and Error*, 5.

JURY.

See, also, *Instructions*; *Verdicts*.

Special Interrogatories—Discretion.

1. The submission of special interrogatories to the jury is a matter confided to the discretion of the district court.—*Poor, Admr., v. Madison River Power Co.*, 236.

Same—Improper Form.

2. A special interrogatory involving two questions, one of which might, under the testimony, have been answered in the affirmative, while to the other an affirmative or negative answer could have been given, was improper.—*Poor, Admr., v. Madison River Power Co.*, 236.

Same—Withdrawal.

3. By accepting a general verdict without requiring the jury to answer a special interrogatory submitted to them, the court in effect withdrew it from their consideration, which it was within its discretion to do.—*Poor, Admr., v. Madison River Power Co.*, 236.

Discharge—Recall.

4. After the jury has been finally discharged from consideration of a case, they may not, except upon consent of all parties, be recalled to answer a special interrogatory submitted to them but which they failed to answer when returning their verdict.—*Poor, Admr., v. Madison River Power Co.*, 236.

Jurors—Judges of What.

5. Jurors are the judges of the credibility of witnesses and of the weight to be given to their testimony; the effect to be given to evidence found to be true must be determined as a question of law.—*State v. Trosper*, 442.

Examination of Jurors on *Voir Dire*—Scope.

6. Defendant mining company, the employees of which were insured against accident by a casualty company, cannot be said to have been prejudiced by the action of the district court in permitting plaintiff to ask each juror on his *voir dire* whether he had any business relations with such casualty company, where it was not apparent that either the purpose or tendency of the question was to inform the juror that the bur-

den of any judgment against the mining company would not fall upon it, but upon the casualty company, and where the latter company was not thereafter mentioned in the case.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Criminal Law—Jury Trial—Extent of Right.

7. In a criminal action the defendant cannot object that a particular juror was not allowed to sit in his case on a challenge for cause; his right being only that he shall be tried by an impartial jury as provided by Constitution, Article III, section 16.—*State v. Byrd*, 585.

JUSTICES OF THE PEACE.

Appeal notice from justices' courts, contents,—see Appeal and Error, 10, 11.

Waiver of defect in service of notice of appeal,—see Appeal and Error, 16.

Action on Official Bond—Defense—Evidence—Admissibility.

1. In an action against a justice of the peace and the sureties on his official bond, for alleged misconduct on the former's part in falsely marking a notice of appeal as filed two weeks later than it was actually filed, by reason of which wrongful act plaintiff's appeal was dismissed and he compelled to pay the amount of the judgment appealed from by him, it was error to exclude from evidence a minute entry of the district court which disclosed that the party who asked to have the appeal dismissed, because of untimely service of the notice of appeal, had waived such defect by his general appearance. If notwithstanding the justice's wrongful act the district court acquired jurisdiction of the appeal, by reason of the waiver, his act was not a proximate, or any, cause of the dismissal, and hence the evidence thus excluded would have amounted to a complete defense in the action on the justice's official bond.—*Davidson v. O'Donnell*, 308.

LABOR.

Hours of, violation of statute by railroad company,—see Criminal Law, 10.

LANDLORD AND TENANT.

Oral Leases—Nature of Occupancy—Evidence.

1. Evidence in an action for rent held to justify a verdict that defendant's occupancy was under an oral lease from year to year, and not under one from month to month; plaintiff could not, therefore, rightfully increase the amount of the rental during the term of such lease.—*Giovanetti v. Schab*, 297.

LAW OF THE CASE.

See, also, Mandamus, 2; Instructions, 8, 9.

What Constitutes.

1. Where upon a former appeal in a personal injury case it was held that under the evidence the cause should have been submitted to the jury, and that the court erred in directing a verdict for defendant, and upon the second trial the testimony was substantially the same as that adduced at the first, the former decision was the law of the case, and the court properly followed the court's direction in this respect.—*Neary v. Northern Pacific Ry. Co.*, 480.

Instructions.

2. Since a decision of the supreme court, whether right or wrong, is the law of the case on a second trial, an instruction couched in

language substantially the same as that used by that court in disposing of one of appellant's contentions was properly given on the retrial.—*Neary v. Northern Pacific Ry. Co.*, 480.

Instructions—Jury must Obey.

3. The court's instructions to the jury are the law of the case, and a verdict in conflict therewith will be set aside on appeal.—*State v. Northern Pacific Ry. Co.*, 557.

LEASES.

Action for rent under oral lease,—see *Landlord and Tenant*, 1.

LICENSE.

Parol,—see *Real Property*, 1-4.

Licensees on railway tracks,—see *Personal Injuries*, 42.

LIENS.

See *Mechanics' Liens*.

LIFE.

Injuries in attempting to save,—see *Insurance*, 4, 5.

LIFE INSURANCE.

See *Insurance*, 1-5.

LIVESTOCK.

Conversion,—see *Conversion*, 5.

Identity of,—see *Criminal Law*, 9.

Injury to, while being transported on railroad,—see *Railroads*, 4-8.

Larceny,—see *Criminal Law*, 9.

LOGS AND LOGGING.

Action on Contract—Insufficiency of Evidence.

1. Evidence adduced in an action to recover for services rendered in cutting timber, *held* to show that plaintiffs, who had been directed to confine their operations to timber standing upon defendant's lands, had trespassed on the public domain, for which unlawful cutting the defendant had paid damages as alleged in his counterclaim, and to be insufficient to justify a verdict in their favor.—*Murphy et al. v. Cooper*, 72.

MANDAMUS.

Return—Contents.

1. The return to a peremptory writ of mandate should contain a certificate of compliance, unless something impossible or unlawful is commanded, or such a change of conditions has taken place as to make compliance improper, in which case the facts should be stated. *State ex rel. Edwards v. District Court*, 369.

Scope of Order—Law of the Case.

2. By affirming the judgment of the district court directing, on proceedings in *mandamus*, the reinstatement of policemen to their offices and the emoluments thereof, the supreme court impliedly held that the remedy by writ of mandate was available to secure to a public officer the salary attached to his office; hence argument on the ques-

tion, on application for a writ of supervisory control to annul a judgment in contempt, was foreclosed.—State ex rel. Edwards v. District Court, 369.

Same—Adequate Remedy at Law—What Constitutes.

3. To defeat the issuance of a writ of mandate on the ground that relator has a plain, speedy and adequate remedy in the ordinary course of law, the remedy must be one which itself enforces in some way the performance of the particular duty enjoined, and not merely one which in the end saves the party to whom the duty is owed, unharmed by its nonperformance.—State ex rel. Johnson v. Collins, Sheriff, 526.

Claim and Delivery—Redelivery Bond—Sureties—Failure to Justify—Duty of Sheriff—Application—Sufficiency.

4. Application for writ of mandate, made to the supreme court, to compel a sheriff to deliver possession of personal property, seized in an action in claim and delivery and thereupon redelivered to defendant upon his furnishing the bond provided for by section 6631, Revised Codes, to plaintiff in such action because of the failure of defendant's sureties to justify, *held*, sufficient as against the contention that it did not show that the relator had exhausted his remedies in the district court, where, though not stating in terms that he had moved that court for an order requiring the officer to perform the duty imposed upon him by section 6632, it did appear therefrom that he had made application for relief and was denied it. State ex rel. Johnson v. Collins, Sheriff, 526.

Same—Failure of Sureties to Justify—Duty of Sheriff.

5. *Held*, that where defendant in a claim and delivery action, after seizure of the property by the sheriff, desires a redelivery thereof to himself, he must not only tender to the officer the redelivery bond provided for by section 6632, Revised Codes, but also have the sureties on said bond justify, in the same manner as upon bail on arrest, as a condition precedent to his right to the return of the property, even though exception to their sufficiency is not taken by plaintiff, or notice thereof given to defendant; *held*, further, that defendant in such an action having failed to have the sureties justify, it was the duty of the sheriff, specially enjoined upon him by section 6632 above, to deliver possession to plaintiff, performance of which duty could be compelled by *mandamus*.—State ex rel. Johnson v. Collins, Sheriff, 526.

Firemen—Reinstatement.

6. *Mandamus* lies to reinstate a fireman who has been discharged in violation of the Act placing paid fire departments under civil service rules. (Revised Codes, secs. 3326 *et seq.*)—State ex rel. Drifill v. City of Anaconda, 577.

Same—Affidavit—Sufficiency.

7. Affidavit examined and held sufficient to show that plaintiff, a city fireman, when asking for writ of mandate to compel his reinstatement, possessed the necessary qualifications of a fireman.—State ex rel. Drifill v. City of Anaconda, 577.

MASTER AND SERVANT.

See Personal Injuries, 1-11, 13-48.

MECHANICS' LIENS.

On Mining Claims—Extent.

1. The provision of section 7293, Revised Codes, limiting the operation of a mechanic's lien, does not apply to mining claims; a lien

upon such property extends to the whole claim.—*McIntyre v. MacGinniss*, 87.

Same—Notice—Sufficiency.

2. A notice of lien upon a lode mining claim which failed to mention the claim by name was nevertheless sufficient to indicate the area within which the work was alleged to have been done, where such claim fell entirely within the boundaries of a placer location which had been properly described.—*McIntyre v. MacGinniss*, 87.

Contiguous Mining Claims—Notice.

3. Notices of mechanics' liens for labor performed on a number of contiguous lode mining claims may properly be prepared upon the theory that the whole group constitutes a single consolidated claim, where such work is reasonably adapted to the development of all the claims.—*McIntyre v. MacGinniss*, 87.

Same—Who Entitled to Liens.

4. For labor performed in the exploitation and sampling of mining claims—such as in making repairs and alterations, building of roads, cutting of cordwood for fuel, keeping machinery in order, clearing away of debris, and the like, liens may properly be filed.—*McIntyre v. MacGinniss*, 87.

Notice of Lien—Account—Contents.

5. One desiring to file a mechanic's lien need not classify the character of work done or set out the items of it in the account filed with the notice; all that is required under section 7291, Revised Codes, is an honest statement from which it may be understood what amount is claimed.—*McIntyre v. MacGinniss*, 87.

On Contiguous Mining Claims—Extent of Lien.

6. Where a group of seven mining claims were improved as a consolidated claim, men employed on the enterprise were entitled to a lien on the entire group, and the fact that they limited their liens to only three of the claims, did not destroy their right altogether.—*McIntyre v. MacGinniss*, 87.

Lessees—Liability.

7. Where work on a group of mining claims was done at the instance of lessees, who in part paid therefor, they were personally liable for the amount unpaid, whether they were technically partners or not.—*McIntyre v. MacGinniss*, 87.

Appeal—Erroneous Judgment—Who may not Complain.

8. A lessee of mining claims upon which a quartz-mill had been erected and in which entire property a bank, also made defendant, claimed an interest, against whom a judgment enforcing mechanics' liens had been properly entered, could not complain because the judgment ordered that in case the proceeds of the sale of his interest were not sufficient to discharge the debt, the entire mill should be sold. The bank, the owner of the other interest, was the only party entitled to complain of this part of the judgment.—*McIntyre v. MacGinniss*, 87.

METROPOLITAN POLICE LAW.

See Cities and Towns, 2-6; 14.

MINES AND MINING.

Mechanics' liens on,—see Mechanics' Liens, 1-8.

Placer mining, dumping sawdust into stream,—see Injunction, 2, 3.

See, also, Personal Injuries, 1-11, 25-27, 31-38.

Adverse Suits—Declaratory Statements—Sufficiency.

1. A declaratory statement of the location of a quartz lode mining claim from the recitals in which it was fairly inferable that the dis-

covery shaft cut the vein at a depth of at least ten feet below the surface, was a substantial compliance with the statute, and therefore sufficient.—Giberson v. Tuolumne Copper Min. Co., 396.

Same—Exclusion from Evidence—When Proper.

2. A declaratory statement of the location of a quartz lode claim was properly excluded where the party offering it had failed to make a preliminary showing relative to the dimensions of the posts used for marking the boundaries, or those of the mounds of earth or rock surrounding each post, or how far they had been set in the ground.—Giberson v. Tuolumne Copper Min. Co., 396.

Same.

3. Where some time prior to discovery of a vein of mineral-bearing rock in place by defendant in an adverse suit, plaintiffs had completed their location of the ground in controversy by filing an amended declaratory statement which cured errors in the description of natural objects and permanent monuments in, and related back to, the original statement, the court properly excluded a like statement offered by defendant, since the latter paper could not operate to cut off the intervening rights of plaintiffs.—Giberson v. Tuolumne Copper Min. Co., 396.

Same—Trial—Pleadings—Amendments After Judgment—Harmless Error.

4. Where in an adverse suit, after ordering a decree in favor of plaintiffs, the trial court permitted them to amend their complaint to admit proof of a second amended declaratory statement, and to introduce it in evidence, any error in such action was without prejudice to defendant, such paper not having been necessary to plaintiffs' case.—Giberson v. Tuolumne Copper Min. Co., 396.

Ejectment—Verdict—Sufficiency.

5. In an action in ejectment to recover possession of a portion of a mining claim, the complaint in which described the whole claim as well as the parcel in dispute, *held* that the verdict in favor of plaintiff "for the restitution of the premises described in the complaint," was not fatally defective as awarding restitution of the whole claim, since the jury must have understood that they were only concerned with the portion in controversy, and had nothing to do with the claim as a whole.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 565.

Same—Issues—Withdrawal from Jury—Decision by Court—Verdict—Sufficiency.

6. Where the court in an action in ejectment instructed the jury that the evidence conclusively established title and right of possession of plaintiff, and that they should find in its favor for the restitution of the premises, and for such damages as the evidence showed plaintiff to have suffered, thus virtually, though not formally, withdrawing from the jury the issues of ownership, right of possession and ouster, and no complaint having been made that the evidence was not sufficient to authorize a directed verdict as to the issues thus withdrawn, a verdict in accordance with the instruction was not fatally defective for failing to also find upon the issues thus withdrawn.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 565.

Same—Declaratory Statements—Defects—Who may not Take Advantage of.

7. Defendants in ejectment who had made no attempt to show title in themselves to the portion of a mining claim in dispute, by location or any other method provided for by the federal statute, were not in position to take advantage of an alleged defect in a declaratory statement, section 2293, Revised Codes, providing that defects in notices or certificates shall not be deemed material "except as against one who has located the same ground, or some portion thereof, in good faith and without notice."—Consolidated Gold & Sapphire Min. Co. v. Struthers, 565.

Same—Title—Pleading—Proof.

8. In ejectment the plaintiff is not required to deraign his title in his complaint; under the allegation of ownership, he may prove such title as he has, from whatever source acquired, and by any species of conveyance recognized by law.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 565.

Same—Certificates—When not *Prima Facie* Evidence of Title.

9. Though it was error to admit a receipt issued by the receiver of the United States land office showing that plaintiff in an action in ejectment had paid money to that officer "in connection" with the purchase of the mining claim in controversy, but not disclosing that plaintiff had made the purchase or was entitled to patent, and which was therefore not such a certificate as is referred to in section 7931, Revised Codes, as being *prima facie* evidence of title, it was error without prejudice, plaintiff's title having been amply established by other proof.—Consolidated Gold & Sapphire Min. Co. v. Struthers, 565.

MONEY LENT.

Complaint, sufficiency,—see Pleading and Practice, 31.

MORTALITY TABLES.

See Personal Injuries, 20.

MUNICIPAL CORPORATIONS.

See Cities and Towns.

MURDER.

See Criminal Law, 15–32.

NEGLIGENCE.

See Personal Injuries.

NEGOTIABLE PAPER.

See Promissory Notes.

NEW TRIAL.**Power of District Court.**

1. While the district court in adopting the findings of the jury and making special findings of its own, in favor of plaintiff in a divorce suit, necessarily passed adversely on the grounds specified by defendant in her notice of intention to move for a new trial, to-wit, that the evidence was insufficient to justify the findings and decision of the court, and that the decision was against law, it could nevertheless again pass upon them in considering the motion.—Rumping v. Rumping, 33.

Premature Notice—Effect.

2. Service of notice of intention to move for a new trial, made before notice of entry of judgment, is premature and ineffective as a basis of the motion.—McIntyre v. MacGinniss, 87.

Entry of Judgment—Notice—Waiver.

3. Though a party intending to move for a new trial may waive formal notice of the entry of judgment by instituting his proceedings in support of his motion without it, such waiver may not be imputed to him where he inadvertently proceeds before he may properly do so.—McIntyre v. MacGinniss, 87.

Notice of Appeal—Service—Adverse Party.

4. Where one of several defendants served his notice of intention to move for a new trial and his notice of appeal upon the only one of his codefendants who had any interest in opposing the relief sought by the motion and appeal, the service was sufficient as against the objection that all the adverse parties had not been served.—*McIntyre v. MacGinniss*, 87.

Appeal—Affirmance, When.

5. Where an order granting a new trial does not disclose the particular ground upon which the court based its action, it will be affirmed if it can be justified upon any of the grounds properly laid in the motion asking a retrial.—*Welch v. Nichols*, 435.

Conflicting Evidence—Appeal—Affirmance.

6. If on an appeal from an order granting a new trial it appears that the evidence presents a substantial conflict, the order will be affirmed (unless it expressly excludes the ground of insufficiency of the evidence), even though the moving party was not as a matter of right entitled thereto on any alleged error of law.—*Welch v. Nichols*, 435.

Insufficiency of Evidence—Discretion.

7. A motion for a new trial on the ground of insufficiency of the evidence is addressed to the discretion of the trial court; its action thereon will not be disturbed unless it is manifest that such discretion has been abused.—*Welch v. Nichols*, 435.

Judgment in Excess of Verdict—Modification.

8. Where a judgment in an action at law awards a larger measure of relief than is warranted by the verdict, it will be modified on appeal, a new trial not being necessary for that purpose.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

NONSUIT.

See Variance, 1-3.

Evidence of Plaintiff—How Viewed.

1. Upon a motion for a nonsuit the plaintiff is entitled to have his evidence considered in the light most favorable to him.—*Johnson v. Butte & Superior Copper Co.*, 158; *McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

NOTARIES PUBLIC.**Fees—Depositions.**

1. A notary public who, in taking depositions, made use of a stenographer employed for that purpose by the party at whose instance they were being taken, and who merely swore the witnesses and attached his certificate to each deposition, was entitled only to the fees prescribed by statute for attaching his certificate and administering the oaths, and not to the additional sum of twenty cents per folio for transcribing the testimony allowed by section 3165, Revised Codes.—*Coleman v. Northern Pacific Ry. Co.*, 123.

NOTICE.

Of appeal, on adverse party,—see *New Trial*, 4.

Of appeal, premature,—see *New Trial*, 2.

Of appeal, waiver,—see *New Trial*, 3.

Of appeal from justice's court, contents,—see *Appeal and Error*, 10, 11.

Of mechanics' liens,—see *Mechanics' Liens*, 2, 3, 5.

OBLIGATIONS.

See *Contracts*, 5, 6.

OFFER OF PROOF.

See Evidence, 10, 15.

OFFICE AND OFFICERS.

Member of paid fire department not an officer,—see Cities and Towns, 24.

Salaries of officers,—see Mandamus, 2.

Office—Vacancies.

1. An office newly created becomes *ipso facto* vacant in its creation. State ex rel. Buckner v. Mayor of Butte, 377.

Cities and Towns—Police Department—*De Facto* Officers—Validity of Acts.

2. Where the mayor of a city of the first class had appointed three residents to constitute the Examining and Trial Board of the police department created by section 3307, Revised Codes, such persons, having qualified, were *de facto* officers whose official acts were legal notwithstanding the city council repeatedly refused to confirm them. State ex rel. Buckner v. Mayor of Butte, 377.

Contempt Proceedings—Right to Office—Question not Triable.

3. The right to exercise the duties of an office cannot be tried summarily in contempt proceedings.—State ex rel. Bowling v. District Court, 532.

OPTIONS.

To repurchase corporate stock,—see Corporate Stock, 6.

ORDINANCES.

Running of railway trains at rate of speed prohibited by ordinance,—see Cities and Towns, 7, 8.

Reasonableness,—see Pleading and Practice, 35.

PARENT AND CHILD.

Services by Child—Compensation.

1. Where an agreement has been made by a parent to pay for the services of his child, it can be enforced, and a conveyance of property in payment for services rendered will be upheld in the absence of actual fraudulent intent.—Officer v. Swindlehurst et al., 126.

Same—Compensation—Implied Contract.

2. A contract to pay for services rendered by a child to its parent may be inferred from circumstances, or may arise from operation of law.—Officer v. Swindlehurst et al., 126.

Same—Compensation—Implied Contract—Consideration.

3. After a daughter became of age she left home and was earning her own as well as a younger brother's living. Three years later her father received an injury which permanently incapacitated him from further physical exertions, and the daughter was called home and from that time furnished practically all the maintenance of the family. About a year thereafter the father, in consideration of past and future services, conveyed to her a piece of property upon which she placed valuable improvements. *Held*, that under these circumstances there was an implied promise on the part of the father, upon the return of the daughter, to pay for the services to be rendered by her, and that the amount due on the date of the conveyance for past services was a valuable consideration for the same.—Officer v. Swindlehurst et al., 126.

PAROL LICENSE.

Revocation,—see Real Property, 1-4.

PARTIES.

Joinder of parties defendant,—see Pleading and Practice, 20.

Necessary, to appeal,—see Appeal and Error, 13.

PAYMENT.

Place of,—see Contracts, 1.

PERSONAL INJURIES.

Pleading—Statutory Actions—Master and Servant.

1. Where a servant relies for recovery for personal injuries on a special statute creating a liability on the part of the master where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Master and Servant—Pleading—Statutory Provisions.

2. Under Revised Codes, section 5248, declaring that every person operating a mine shall be liable for injuries to employees when caused by the negligence of any superintendent, foreman, shift-boss, etc., a complaint which charged defendant company and its foreman with primary negligence in failing to use ordinary care to furnish plaintiff a safe place to work, and did not allege any specific acts of negligence on the part of the foreman imputable to the master, failed to state a cause of action falling within that section.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Pleading and Proof—Variance—Nonsuit.

3. The plaintiff in a personal injury action may recover only upon proof establishing substantially the cause of action alleged; hence where the evidence tended to show an act of negligence other than the one relied on in the complaint, the court properly granted a nonsuit on the ground of variance.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Master and Servant—Mines—Shift-boss—Fellow-servant.

4. A shift-boss in a mine whose duty extends no further than to guide and direct the employees under him in the performance of the particular work in which he is engaged with them, is, under the common-law rule, a fellow-servant of his coemployees.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Same—Mines—Assumption of Risk.

5. Plaintiff, a miner, had been working in the place where he was injured for about seventeen days, and was familiar with the ground. After having been told by the shift-boss that the ground was safe and instructed to proceed with timbering, he left the workings to procure timbers and returned after an absence of over three hours. Without seeing whether the ground, after that lapse of time, was still safe, and omitting the usual precaution of putting up temporary lagging to protect himself, he proceeded to put in the timbers, and was injured by falling rock. *Held*, that he assumed the risk incident to working under such conditions, since the danger was open and obvious.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Same—Mines—Creating Place to Work—Assumption of Risk.

6. The rule that the master is bound to use ordinary care to furnish the servant a reasonably safe place in which to work has no application to a case where the latter's employment consists in creating the place of work, as in mining; any dangers arising from the work as it progresses or while making a dangerous place safe are assumed by the servant. After completion of the place, however, it is incumbent upon

the master to keep it safe, and to that end to inspect and repair it from time to time.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Same—Mines—Negligence of Shift-boss—Evidence.

7. In an action to recover damages for personal injuries, brought under section 5248, Revised Codes, making the operator of a mine liable for injuries caused by the negligence of a superintendent, shift-boss, *etc.*, plaintiff *held* to have made out a *prima facie* case upon which to go to the jury, upon the questions whether a timber which, in falling, produced the injury, was caused to fall by a shift-boss of defendant company, and whether such person occupied the position of shift-boss.—*Johnson v. Butte & Superior Copper Co., Ltd.*, 158.

Same—"Shift-boss"—Definition.

8. The term "shift-boss" as used in section 5248, Revised Codes, means a master workman who directs the operations of a set of men who work in turn with other sets.—*Johnson v. Butte & Superior Copper Co., Ltd.*, 158.

Same—Mines—Negligence of Shift-boss—Liability of Master—Statute—Construction.

9. Under section 5248, Revised Codes, making a mine operator liable for injuries to one of his employees when caused by the negligence, *inter alia*, of a shift-boss, the fact that the negligent act of such shift-boss, which caused the injury, was not connected with the work of directing the men under him, but was committed while doing the work of one of his subordinates, does not relieve the operator from liability; so long as the act is done in the due course of his employment, the master is responsible, whether done in the discharge of delegable or nondelegable duties.—*Johnson v. Butte & Superior Copper Co., Ltd.*, 158.

Same—Survival of Actions.

10. An action for injuries to a servant survives under the statute, and may be prosecuted either by his heirs or personal representatives; but, by whomsoever prosecuted, it is the action which he had for the injuries and which accrued to him at the time he was injured, as distinguished from the damages which he or his estate suffered by reason of his death therefrom.—*Johnson v. Butte & Superior Copper Co., Ltd.*, 158.

Injuries Sustained While Attempting to Save Life—Negligence.

11. The law will not impute negligence to one who, in an attempt to save human life, is injured, unless the attempt be made under such circumstances as to constitute it rashness in the estimation of prudent persons.—*Da Rin, Admr., v. Casualty Company of America*, 175.

Instructions—Conformity to Issues—Harmless Error.

12. Though the district court erred, in an action to recover damages for the death of an employee occasioned by coming in contact with a highly charged electric wire, in submitting an instruction upon an issue of negligence not involved in the case as tried, such error was non-prejudicial to defendant, in view of the fact that the instruction placed an additional burden upon plaintiff which, under the theory of the case, he was not bound to assume.—*Poor, Admr., v. Madison River Power Co.*, 236.

Railroads—Master and Servant—When Relationship Exists.

13. *Held*, in an action by a freight conductor against his employer, brought under section 5251, Revised Codes, making a railroad company liable for injuries sustained by an employee while employed in the discharge of his duties, through the negligence of any other employees, that plaintiff who, during the entire time when away from his home terminal, was subject to be called on duty and required to be within

call; and who, though not required to do so under his contract of employment, was nevertheless expected to occupy the caboose of his train at night, was, when injured in a collision while asleep in the caboose, standing on a sidetrack, in the discharge of his duties, and did not occupy the position of a mere licensee, even though his pay had, for the time being, ceased and would not begin again until called on duty.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Negligence—Who Liable.

14. A caboose was placed on a yard track terminating at an excavation, toward which the track graded sharply. There was no device to prevent escaping cars from falling into the excavation. A yard crew while at work in making up a train placed cars on the track but failed to properly secure them by brakes, and in escaping they ran against the caboose and caused it to fall into the excavation, injuring plaintiff conductor. *Held*, that the defendant company and the yard foreman, whose duty it was to see that proper precautions were observed in the making up of trains, were liable for the injuries received.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Duty of Master.

15. Under the circumstances set forth in paragraph 13, *supra*, the railroad company was bound to use ordinary care to provide the plaintiff a reasonably safe place in which to stay and to maintain that condition, and to that end to see that the yard crew took ordinary precautions not to allow cars to escape and collide with the caboose in which plaintiff was sleeping.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Negligence—Pleading and Proof.

16. Although several acts of negligence are alleged in the complaint in a personal injury action, proof of all those alleged is not required; a recovery will be sustained upon proof of any one or more of them.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Complaint—Pleading and Proof.

17. An allegation in the complaint that defendants negligently drove the railroad cars against the caboose in which plaintiff was sleeping was sustained by evidence tending to show that the cars escaped, the brakes having been insecurely set.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Assumption of Risk—What Constitutes.

18. While plaintiff (a freight conductor), in sleeping in a caboose while waiting to be called on duty, assumed those risks of injury incident to the handling of cars by the yard crew engaged in the making up of his train which were known to him, he did not assume those which might arise from the negligence of said crew in failing to so securely set the brakes as to prevent them from escaping.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Assumption of Risk.

19. The test to be applied in determining whether a servant assumed a risk is, not whether he exercised reasonable care to discover the danger, but whether the danger was known to him or plainly observable.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Measure of Damages—Mortality Tables—Instructions.

20. Instructions on the measure of damages in a personal injury action, which told the jury that if plaintiff's capacity to earn money had been reduced by reason of his injuries, they should award such a sum as would purchase an annuity equal to the difference in the amount he could earn annually in his then condition, and the amount he could have earned if he had not been injured, having due regard to diminished earning capacity due to advancing age, etc., and that mortality

and annuity tables were not to be considered as an absolute basis for their calculations, but should be used as a guide only so far as the facts before them corresponded to those from which the tables were computed, correctly stated the law.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Master and Servant—Parties Defendant—Joinder.

21. *Held*, that a master and his servant may properly be joined as defendants in an action for personal injuries, directly caused by the negligence of the servant, for which negligent act the master is responsible under the doctrine of *respondeat superior*.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Street Railways—Passengers—Complaint—Sufficiency.

22. The complaint in an action against a street railway company to recover damages for injuries sustained in being thrown from the steps of the car while waiting to alight at his destination, and after the car had stopped but before plaintiff had time to step off, *held* sufficient to state a cause of action.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Same—Complaint—Evidence—Failure of Proof.

23. Plaintiff alleged in his complaint against a street railway company that while he was at his destination and in the act of stepping off defendant's car (thus implying that the car had stopped), it was negligently started with a sudden jerk, causing him to be thrown to the ground and injured. The testimony showed that while the speed of the car had slackened, it did not stop but, having run by his destination at a slow rate of speed, suddenly accelerated its speed, causing plaintiff to fall. *Held*, that there was such a variance as amounted to a failure of proof.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Same—Passengers—Alighting from Car While in Motion—Responsibility of Carrier.

24. Where a passenger alleges in his pleadings, or shows by his proof, that he alighted from defendant's car while the same was in motion, he must also show his reason for so doing, *i. e.*, that the proximate cause of his injury was negligence on the part of defendant. The mere fact that he was injured is not alone sufficient to charge the carrier with responsibility therefor, unless the injury is caused by some agency for which the carrier is responsible.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Rescuing Person in Danger—Recovery Proper, When.

25. One who, observing another in peril, voluntarily exposes himself to the same danger to save the latter's life, may recover for any injury sustained in effecting the rescue, from the person by whose negligence the peril was brought about, provided the exposure is not made under such circumstances as to constitute rashness in the judgment of prudent persons.—*Bracey v. Northwestern Improvement Co.*, 338.

Variance—Failure of Proof—Nonsuit.

26. The complaint in an action to recover damages for the death of a coal miner who, while attempting to rescue a fellow-workman, was himself overcome by poisonous gases and died from the effect of their inhalation, charged that the death of decedent was due to the accumulation of gases spontaneously generated in unused workings entered by him. The evidence disclosed that the gases from the inhalation of which deceased died, were generated by a fire in the mine. *Held*, that there thus appeared between the cause of action alleged and the evidence adduced to establish it, such a variance as amounted to a failure of proof, and that a motion for nonsuit was properly granted.—*Bracey v. Northwestern Improvement Co.*, 338.

Evidence—Causal Connection.

27. In personal injury cases the evidence must tend not only to show the negligence alleged, but also the causal connection between it and the injury.—*Bracey v. Northwestern Improvement Co.*, 338.

Cities and Towns—Defective Sidewalks—Accumulation of Snow and Ice—Complaint—Sufficiency.

28. The complaint in an action against a city which, among other things, alleged that defendant had permitted snow and ice to accumulate on a sidewalk, thus forming a smooth, slippery and slanting surface, dangerous to pedestrians; that, after due notice, it had failed to remove the same or to put a warning signal at the dangerous place; and that by reason of said negligence and carelessness plaintiff slipped and fell, receiving the injuries complained of, was sufficient, as against a general demurrer, to show negligence on the part of the city and its causal connection with plaintiff's injuries.—*Townsend v. City of Butte*, 410.

Same—Liability of City.

29. A city is liable in damages for injuries occasioned by its failure to remove from a sidewalk under its control snow and ice which had accumulated from natural causes and formed a smooth, slippery and slanting surface over which it was dangerous for pedestrians to travel, which condition was permitted to remain for an unreasonable period of time after it had actual or constructive notice thereof.—*Townsend v. City of Butte*, 410.

Contributory Negligence—Instructions Relative to—When Unnecessary.

30. An instruction relative to contributory negligence in a personal injury case was properly refused where there was neither a plea nor any evidence upon the subject.—*Townsend v. City of Butte*, 410.

Mines and Mining—Survival of Action—To Whom.

31. Under the express provision of section 5250, Revised Codes, the right of action to recover damages for injuries to a mine employee, alleged to have been caused by the negligence of a fellow-servant, survives to, and may be prosecuted and maintained by, the heirs or personal representatives of the deceased.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Same—Statute of Limitations—"Liability Created by Statute."

32. *Held*, that an action brought under Chapter 23, Laws of 1905, p. 51 (Revised Codes, secs. 5248-5250), to recover damages for injuries to a mine employee, does not fall within the category of those founded "upon a liability created by statute," mentioned in section 6449, subdivision 1, as being barred unless brought within two years.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Same—Jurors—Examination on *Voir Dire*—Scope.

33. Defendant mining company, the employees of which were insured against accident by a casualty company, cannot be said to have been prejudiced by the action of the district court in permitting plaintiff to ask each juror on his *voir dire* whether he had any business relations with such casualty company, where it was not apparent that either the purpose or tendency of the question was to inform the juror that the burden of any judgment against the mining company would not fall upon it, but upon the casualty company, and where the latter company was not thereafter mentioned in the case.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Same—Negligence—Fellow-servants—Evidence—Sufficiency.

34. Evidence, circumstantial in character, *held* sufficient to warrant submission of the case to the jury on the question whether injuries to a mine employee were caused through the mishandling of a hoisting

engine by the engineer, his fellow-servant, so as to make defendant mining company liable under Chapter 23 of the Laws of 1905, page 51. *Beeler v. Butte & London C. Dev. Co.*, 465.

Same—Negligence—Pleading and Proof.

35. Plaintiff in a personal injury action is not required to prove each of the particulars of negligence alleged in the complaint; if enough is shown to establish that negligence in any of the particulars charged was the proximate cause of the injuries, a case is made sufficient to go to the jury.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Same—Survival of Action—Instantaneous Death—Recovery of Damages—Instructions.

36. An instruction in an action for personal injuries to an employee of a mine, caused by the negligence of a fellow-servant—which right of action survived to his heirs, under section 5250, Revised Codes—that in determining the amount of recovery the jury were limited *inter alia* to a sum of money which would have compensated the deceased for pain and suffering, if any, between the injury and his death, if he survived the injuries for “any length of time,” was not objectionable where, by the use of the subsequent words “unless you find death was instantaneous,” the jury were correctly informed that there must have been an appreciable period of suffering to warrant recovery on that account.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Same.

37. The right of action which survives to the heirs or representatives of one who dies from injuries received through the negligence of a fellow-servant while working in a mine includes not only damages for the pain and suffering endured by deceased, but also for the loss of earning capacity for the period of his natural expectancy of life.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Same—Safety Cages—Absence of Doors—Evidence—Admissibility.

38. Even though, under section 8536, Revised Codes, mining cages, when used in sinking a shaft, need not be equipped with doors, and plaintiffs did not claim any right to recover on account of their absence from the one between which and the wall plates of the shaft deceased was caught while being hoisted, evidence of their absence was nevertheless competent as bearing upon the degree of care required of the engineer, through whose negligence the accident was alleged to have occurred, in lowering and hoisting the cage.—*Beeler v. Butte & London C. Dev. Co.*, 465.

Railroads—Cities and Towns—Speed of Trains—Ordinances—Validity—Pleading.

39. To enable the defendant railroad company to show that an ordinance regulating the speed at which trains could be run within the city limits was void, because unreasonable, when applied to that portion of its yards where the accident occurred which gave rise to a personal injury action, it should have pleaded the facts upon which such claim was based.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Complaint—Wanton Negligence—Surplusage.

40. *Held*, that under an allegation in the complaint that defendant acted so “wantonly and grossly carelessly and negligently” in the running of one of its trains as to cause the death of plaintiffs’ intestate, a recovery may be had upon proof of ordinary negligence only, the adverbs “wantonly” and “grossly” being treated as surplusage.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Law of the Case—What Constitutes.

41. Where upon a former appeal in a personal injury case it was held that under the evidence the cause should have been submitted to

the jury, and that the court erred in directing a verdict for defendant, and upon the second trial the testimony was substantially the same as that adduced at the first, the former decision was the law of the case, and the court properly followed the court's direction in this respect.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Licensees—Care Required of Defendant—Evidence—Insufficiency.

42. Evidence *held* to show an agreement between defendant railroad company and a connecting line, under which the employees of the latter could use the tracks of the former in making up and operating trains, and that therefore deceased, a freight train conductor in the employ of the latter company, who was killed while engaged in checking his train standing on defendant's tracks, was not a mere licensee to whom defendant did not owe the duty of keeping an active lookout for his presence on the tracks.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Operation of Trains—Care Required.

43. Though, generally speaking, no duty rests upon a locomotive engineer to stop his train whenever he sees a person on the track, but he may presume in the first instance that such person will heed the usual warning signals and take a place of safety, yet where an engineer saw decedent on the track, apparently so engrossed in his duties as to pay no attention to signals, and, upon sounding the whistle when 600 feet away, ran over 450 feet after applying the emergency brake, though he could have stopped within 300 feet, the question whether under all the facts and circumstances he was justified in acting upon the presumption above referred to, was one for the jury, and a charge that under the circumstances of this case it was the duty of the engineer to use reasonable care to discover decedent's peril was proper.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Contributory Negligence—Proximate Cause.

44. The contributory negligence of a plaintiff or deceased person which will operate to defeat a recovery must have been such as directly contributed to the injury at the time it was inflicted: his negligence must have been a proximate cause of the injury.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Excessive Speed of Trains in Cities—Negligence *Per Se*.

45. The running of a railroad train in a city in excess of the rate of speed fixed by ordinance is negligence *per se*, and where this lapse of duty directly contributes to an injury, liability attaches to the person responsible therefor.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Cities and Towns—Excessive Speed of Trains—Proximate Cause of Injury.

46. Where owing to the excessive rate of speed at which a train was run within the city limits, contrary to the provisions of an ordinance, both before and after discovery of the peril of deceased, a freight conductor who was so absorbed in checking his train as not to notice the approach of the train on the track on which he was standing, the locomotive engineer was unable to stop so as to avoid the accident, the inability of the engineer to bring the train to a stop because of the violation of the ordinance, and not the contributory negligence of deceased in placing himself in a situation of danger, *held*, to have been the proximate cause of the accident.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Duty of Railway Engineer Approaching City Limits.

47. An engineer in charge of a railway locomotive who, on approaching the limits of a city or town at a speed prohibited by ordinance

observes a person upon the tracks over which he is about to pass, must instantly reduce his speed to the ordinance limit, and may not rely upon the presumption that such person will upon signal assume a place of safety.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Excessive Verdict—What Does not Constitute.

48. A verdict of \$25,000 as damages for the negligent killing of a freight train conductor, whose expectancy of life was twenty-nine years, and whose monthly earnings had been \$150, *held* not excessive. Where a verdict, claimed to be excessive, is capable of being arrived at by mathematical calculation, the elements of passion and prejudice will not be presumed to have influenced the minds of the jurors.—*Neary v. Northern Pacific Ry. Co.*, 480.

PERSONAL PROPERTY.

Transfer, whether pledge or sale,—see Corporate Stock.

PLEADING AND PRACTICE.

Conversion—Complaint—Ownership and Possession.

1. In an action for conversion the plaintiff must allege a general or special ownership in the property in controversy, and a right to the immediate possession of it at the time of the conversion.—*Paine et al. v. British-Butte Min. Co.*, 28.

Same—Ownership—Title—Sufficiency—How Determined.

2. Plaintiff in conversion may, in pleading ownership of the property in him at the time of the wrong complained of, set forth the links in his chain of title, and if he follows such statement by a declaration that “thereby” or “by virtue thereof” he became the owner, the sufficiency of such concluding allegation must be tested by the facts set forth in the deraignment of title.—*Paine et al. v. British-Butte Min. Co.*, 28.

Same—Ownership—Complaint—Deraignment of Title—Sufficiency—How Determined.

3. Where plaintiff in an action in conversion, instead of directly alleging ownership in him at the time of the conversion, merely states facts from which his title may be inferable, title in him must be the inevitable inference from the facts stated, else the complaint is vulnerable to demurrer for ambiguity and uncertainty.—*Paine et al. v. British-Butte Min. Co.*, 28.

Same—Ownership—Complaint—Insufficiency—Demurrer.

4. *Held*, under the rules stated in paragraphs 2 and 3 above, that the complaint, in an action for the conversion of corporate stock, which, while alleging that the owners of the stock had for a valuable consideration transferred and assigned in blank the certificates representing it, “and delivered the same to plaintiffs, who thereby became and were owners and holders thereof,” failed to state that any consideration passed from plaintiffs, or that the certificates were delivered with the intent to transfer title to plaintiffs, or that they had been transferred or assigned to them, was demurrable for ambiguity and uncertainty, the allegations being as consistent with the idea of ownership in some third person as with that of ownership in plaintiffs.—*Paine et al. v. British-Butte Min. Co.*, 28.

Statutes Creating New Liability—Pleading and Proof.

5. To enable a person to recover under a statute creating a liability where none existed before, he must not only plead facts bringing his cause of action within its purview, but prove them as alleged.—*Miley v. Northern Pacific Ry. Co.*, 51.

Garnishment—Pleadings—Counterclaim.

6. In a suit against a garnishee by the attaching creditor, the former cannot assert a counterclaim under a general denial of indebtedness; to make it available, such counterclaim must be specially pleaded.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Same—Pleading—Bill of Particulars.

7. The furnishing of a bill of particulars in which a garnishee had listed a claim as a setoff against the attaching creditor's demand did not constitute a pleading of a counterclaim.—*Dolenty v. Rocky Mt. Bell Tel. Co.*, 105.

Personal Injuries—Master and Servant—Pleading—Statutory Actions.

8. Where a servant relies for recovery for personal injuries on a statute creating a liability on the part of the master where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Pleading Inconsistent Defenses.

9. Although the defendant may interpose inconsistent defenses, they must not be so far inconsistent that if the allegations of one are true, the allegations of the other must of necessity be false.—*Johnson v. Butte & Superior Copper Co.*, 158.

Pleadings—Admissibility in Evidence.

10. Since under section 6565, Revised Codes, pleadings must be verified, admissions in an answer may properly be offered in evidence; and the plaintiff in doing so need not embrace in his offer the entire answer, nor is he estopped from denying or disproving statements contained in the pleading.—*Johnson v. Butte & Superior Copper Co.*, 158.

Cross-bills.

11. Under the Code practice there is no such pleading in this state as a cross-bill.—*Alywin v. Morley et al.*, 191.

Accounting—Counterclaims Against Codefendant.

12. *Quære*: In view of the fact that section 6541, Revised Codes, defining a counterclaim, makes no mention of a claim by one defendant against another, may a defendant obtain affirmative relief against a codefendant, under the Code practice, in an action for an accounting, by filing a pleading in the nature of a counterclaim?—*Alywin v. Morley et al.*, 191.

Same—Pleadings—Insufficiency.

13. Plaintiff brought an action for an accounting. The facts stated in his complaint were upon trial found to be untrue, and his action was dismissed. One of defendants filed an answer asking for an accounting against her codefendants. This pleading was insufficient in that she had never made any demand for an accounting. She obtained judgment as prayed. *Held*, that the court erred in granting the relief thus asked, in that, assuming that *where plaintiff has and states a cause of action* for an accounting, the court may, in order to avoid a multiplicity of suits, determine the whole controversy, settle the rights of the defendants *inter sese* and grant one defendant affirmative relief against a codefendant even though his answer may be insufficient to support a judgment, the allegations of plaintiff's complaint which he failed to substantiate had become so much surplusage, and the defendant's pleading having proven insufficient, there was therefore not *any* pleading to sustain the decree.—*Alywin v. Morley et al.*, 191.

Negligence—Pleading and Proof.

14. Although several acts of negligence are alleged in the complaint in a personal injury action, proof of all those alleged is not required;

a recovery will be sustained upon proof of any one or more of them.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Same—Complaint—Pleading and Proof.

15. An allegation in the complaint that defendants negligently drove railroad cars against the caboose in which plaintiff was sleeping was sustained by evidence tending to show that the cars escaped, the brakes having been insecurely set.—*Moyse v. Northern Pacific Ry. Co.*, 272.

Pleadings—Amendment During Trial—Discretion.

16. The allowance of an amendment to defendant's answer, during trial, was within the sound legal discretion of the district court; in the absence of a showing of abuse thereof, its action will not be disturbed on appeal.—*Giovanetti v. Schab*, 297.

Same—Amendment—Objection—When Too Late.

17. An objection to the allowance of an amendment of the answer, in an action for unlawful detainer, on the ground that it was not verified, not made until after the amendment had been allowed, was too late.—*Giovanetti v. Schab*, 297.

Action Against Corporation—Incorporation—Sufficiency of Complaint.

18. The complaint in an action against a corporation alleging that the defendant was a corporation was sufficient to show that it had the legal capacity to be sued; the failure to allege the place of its incorporation did not render the pleading insufficient.—*Pearce v. Butte Electric Ry. Co.*, 304.

Complaint—Absence of Formal Prayer for Judgment—Scope of Relief.

19. Where the complaint in a personal injury action, to which defendant failed to answer, contained language showing the limits of plaintiff's claim, to-wit: That he had been damaged in a certain sum—the absence of a formal prayer for judgment did not deprive the court of power to enter judgment. The defendant could not have been misled by the language employed; it served the same practical purpose as a formal prayer, and was sufficient.—*Pearce v. Butte Electric Ry. Co.*, 304.

Master and Servant—Personal Injuries—Passengers—Parties Defendant—Joinder.

20. *Held*, that a master and his servant may properly be joined as defendants in an action for personal injuries, directly caused by the negligence of the servant, for which negligent act the master is responsible under the doctrine of *respondeat superior*.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Personal Injuries—Street Railways—Passengers—Complaint—Sufficiency.

21. The complaint in an action against a street railway company to recover damages for injuries sustained in being thrown from the steps of the car while waiting to alight at his destination, and after the car had stopped but before plaintiff had time to step off, *held* sufficient to state a cause of action.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Same—Passengers—Alighting from Car While in Motion—Responsibility of Carrier.

22. Where a passenger alleges in his pleadings, or shows by his proof, that he alighted from defendant's car while the same was in motion, he must also show his reason for so doing, *i. e.*, that the proximate cause of his injury was negligence on the part of defendant. The mere fact that he was injured is not alone sufficient to charge the carrier with responsibility therefor, unless the injury is caused by some agency for which the carrier is responsible.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Complaint—Ambiguity—Special Demurrer.

23. Ambiguity in a complaint can be reached by special demurrer only.—*Wahle v. Great Northern Ry. Co.*, 326.

Railroads—Carriage of Livestock—Damages—Complaint—Sufficiency.

24. Under the rule that if a complaint states facts sufficient to warrant a recovery upon any theory, it must be sustained, a complaint against a railway company to recover damages for injury to livestock wrongfully accepted by the carrier for transportation when it knew, or should have known, that delivery at the place of destination was impossible under the then existing conditions of its road, though rendered ambiguous by unnecessary allegations specifying the elements of damage, *held* sufficient in the absence of a special demurrer. *Wahle v. Great Northern Ry. Co.*, 326.

Complaint—When Proof Against General Demurrer.

25. The rule that if, upon the facts alleged in the complaint, the plaintiff is entitled to the relief demanded, or to any relief, the pleading is proof against a general demurrer, applies also to each count of the complaint.—*Solem v. Connecticut Fire Insurance Co.*, 351.

Fire Insurance—Defenses—False Statements—Pleading.

26. The defense that a policy of fire insurance became void under one of its provisions because of false statements made by the insured in the proof of loss must be pleaded, otherwise it will be deemed waived; and the fact that defendant company did not become aware of the falsity of such statements until trial was not any excuse for failure to interpose an appropriate plea, since leave to amend its answer might then have been asked.—*Solem v. Connecticut Fire Insurance Co.*, 351.

Conversion—Complaint—Sufficiency—Certainty.

27. The complaint in an action for the conversion of a steer, a general demurrer to which had been sustained by the trial court, examined and *held* not to be so ambiguous, unintelligible and uncertain as to fail to set forth the plaintiff's cause of action in such language as to enable a person to determine from its reading what the facts relied upon by plaintiff were.—*Carpenter v. Nelson*, 392.

Trial—Pleadings—Amendments After Judgment—Harmless Error.

28. Where in an adverse suit, after ordering a decree in favor of plaintiffs, the trial court permitted them to amend their complaint to admit proof of a second amended declaratory statement, and to introduce it in evidence, any error in such action was without prejudice to defendant, such paper not having been necessary to plaintiff's case.—*Giberson v. Tuolumne Copper Min. Co.*, 396.

Criminal Law—Receiving Stolen Property—Allegation of Value—Surplusage.

29. An information charging the offense of receiving stolen property need not allege its value; where it is alleged, the allegation may be treated as surplusage.—*State v. Moxley*, 402.

Complaint—Sufficiency—How Tested.

30. In testing the sufficiency of a complaint when attacked by general demurrer or by any other means of raising the question, the court will not confine itself to determining whether it states a cause of action for the particular relief prayed for, but if upon any view, the plaintiff is entitled to relief, the pleading will be sustained.—*Cassidy v. Slemons & Booth*, 426.

Money Lent—Complaint—Demand.

31. Plaintiff alleged in her complaint that she loaned a specified sum of money to defendant company, for which a receipt was issued to her; that none of the principal and only part of the interest had been

repaid, *etc.* *Held*, that the complaint was sufficient to warrant recovery for money lent; that the allegation that defendant gave a receipt to plaintiff did not convert the action into one to recover upon a certificate of deposit, so as to make the pleading insufficient for failure to allege a demand; but that such allegation was a pleading of evidence, and therefore immaterial.—*Cassidy v. Slemons & Booth*, 426.

Same—Demand—When Unnecessary.

32. The general rule that where money is to become due only after demand, it is necessary for plaintiff to allege, and prove, that this requirement had been met, does not apply where defendant denies all liability. Under such circumstances a demand would be useless, and hence is not required by law.—*Cassidy v. Slemons & Booth*, 426.

Personal Injuries—Railroads—Cities and Towns—Speed of Trains—Ordinances—Validity—Pleading.

33. To enable a defendant railroad company to show that an ordinance regulating the speed at which trains could be run within the city limits was void, because unreasonable, when applied to that portion of its yards where the accident occurred which gave rise to a personal injury action, it must plead the facts upon which such claim was based.—*Neary v. Northern Pacific Ry. Co.*, 480.

Same—Complaint—Wanton Negligence—Surplusage.

34. *Held*, that under an allegation in the complaint that defendant acted so “wantonly and grossly carelessly and negligently” in the running of one of its trains as to cause the death of plaintiffs’ intestate, a recovery may be had upon proof of ordinary negligence only, the adverbs “wantonly” and “grossly” being treated as surplusage.—*Neary v. Northern Pacific Ry. Co.*, 480.

Injunction—Pleading—Conclusions.

35. The bare statement in a complaint asking for an injunction to restrain a mining corporation from constructing a railroad upon and along the streets of a city under an ordinance granting it the right to do so, that said ordinance was unreasonable, was a mere conclusion, and insufficient to warrant any relief on the ground that the council abused its discretion in enacting it.—*Kipp v. Davis-Daly Copper Co.*, 509.

Ejectment—Title—Pleading.

36. In ejectment, the plaintiff is not required to deraign his title in his complaint; under the allegation of ownership, he may prove such title as he has, from whatever source acquired, and by any species of conveyance recognized by law.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

Fire Department—Unlawful Discharge of Member—*Mandamus*—Affidavit—Sufficiency.

37. The statement of plaintiff, a discharged fireman, in his affidavit for writ of mandate to compel his reinstatement, that he had been duly appointed and confirmed as a member of the fire department, and that at all times he had the physical ability to perform his duties as such, was a sufficient allegation that he possessed the qualifications of a fireman as defined in section 3330, Revised Codes.—*State ex rel. Drifill v. City of Anaconda*, 577.

PLEDGES.

Whether transfer of personal property constitutes pledge or sale, see *Corporate Stock*, 1-6.

POLICE DEPARTMENT.

Civil service law,—see Cities and Towns, 2-6, 14.

PRESUMPTIONS.

Appeal—Briefs—Failure to Point Out Evidence.

1. Where the brief of appellant fails to point out evidence in support of his contention relative to a given subject, the supreme court will not search the record to find it, but indulge the presumption that there was no evidence on the point.—*Kelly v. Granite Bi-Metallic C. Min. Co.*, 1.

Equity Cases—Evidence—Exclusion—Record.

2. Error may not be predicated upon the action of the trial court in excluding competent testimony offered in a water right suit which was tried without the aid of a jury, where appellant subsequently succeeded in incorporating such testimony into the record. The presumption obtains that the court, in arriving at a conclusion, considered it.—*White v. Barling*, 138.

Appeal—Burden of Showing Error.

3. On appeal the presumption obtains that the trial court did not commit error. The burden, therefore, rests upon appellant to show that error was in fact committed.—*Cassidy v. Slemons & Booth*, 426.

Criminal Law—Innocence of Accused.

4. Every presumption is in favor of the innocence of one accused of crime.—*State v. Northern Pacific Ry. Co.*, 557.

Same—Error—Prejudice.

5. In criminal cases it is no longer the rule in this state that where error is shown, prejudice will be presumed.—*State v. Byrd*, 585.

PROBATE PROCEEDINGS.

Contest of probate of will,—see Wills, 1-5.

Powers of District Courts.

1. District courts, when sitting in probate, have no other powers than those expressly conferred by statute; their proceedings are regulated thereby and are *in rem*.—*State ex rel. Floyd v. District Court*, 357.

PROHIBITION.

See Contracts, 3; Appeal and Error, 11.

PROMISSORY NOTES.

See, also, Banks and Banking, 1-4.

Want of Consideration—Defense.

1. It is a valid defense to the enforcement of a promissory note against the maker by the party to whom it was delivered, that the note was without consideration and was delivered on condition that the maker should not be held liable thereon.—*State Bank of Moore v. Forsyth*, 249.

PUBLIC USE.

Street Railroads—Hauling Freight—Mining.

1. *Held*, that the use to which a railroad proposed to be constructed in the streets of a city by a mining company was to be put in hauling supplies, ores, etc., to and from the company's mine, as well as supplies, ores, merchandise, etc., which might be offered for carriage by any person or corporation, was a public use.—*Kipp v. Davis-Daly Copper Co.*, 509.

RAILROADS.

See, also, Personal Injuries, 13-24, 39-48; Street Railways.

Violation of statute fixing hours of labor of trainmen,—see Criminal Law, 10-14.

Carriage—Special Contracts—Power to Make.

1. In the absence of statutory prohibition, a railway company may sell, for a reduced fare, a particular form of ticket, whereby its liability is restricted and its obligations curtailed.—*Miley v. Northern Pacific Ry. Co.*, 51.

Transportation—Statutory Provision.

2. *Quære*; Is a railway company required, under section 4330, Revised Codes, upon tender of the regular fare, to furnish a ticket to a person desiring passage to a certain station on its line, good upon all its passenger trains running past such point?—*Miley v. Northern Pacific Ry. Co.*, 51.

Same—Failure to Stop at Station—Statutory Penalty—When not Recoverable.

3. Section 4330, Revised Codes, provides that every railway company must, upon tender of the regular fare, furnish a ticket entitling the purchaser to ride to any other station on its line, etc. Plaintiff bought an excursion ticket at a reduced rate to a certain station on defendant's line and boarded a train which did not stop at the point to which her ticket called for transportation. She brought suit to recover, and recovered, the penalty of \$200 provided for in the section above. *Held*, that plaintiff, having failed to pay the regular fare for her ticket, was not one of the class of persons for whose benefit the statute was enacted, and therefore could not maintain an action for the penalty provided in it.—*Miley v. Northern Pacific Ry. Co.*, 51.

Same—Injury to Livestock—Complaint—Sufficiency.

4. Under the rule that if a complaint states facts sufficient to warrant a recovery upon any theory, it must be sustained, a complaint against a railway company to recover damages for injury to livestock wrongfully accepted by the carrier for transportation when it knew, or should have known, that delivery at the place of destination was impossible under the then existing conditions of its road, though rendered ambiguous by unnecessary allegations specifying the elements of damage, *held* sufficient in the absence of a special demurrer.—*Wahle v. Great Northern Ry. Co.*, 326.

Carriage of Livestock—Wrongful Acceptance for Transportation—Evidence—Immateriality.

5. In an action against a common carrier for wrongfully accepting livestock for transportation when it had not the facilities to make delivery, a contract offered in evidence, modifying and limiting defendant's ordinary obligations, was properly excluded, since, being unable to perform its contract of carriage and delivery, it was immaterial whether defendant had been relieved by the stipulations of the special agreement from any of the obligations ordinarily incident to a contract of carriage.—*Wahle v. Great Northern Ry. Co.*, 326.

Same—Evidence—Proper Exclusion.

6. The special contract referred to in paragraph 5 above was further properly excluded because made between plaintiffs and a carrier other than the one sued, even though such other road was only a division of the defendant named and plaintiffs understood that such was the case.—*Wahle v. Great Northern Ry. Co.*, 326.

Same—Liability of Carrier.

7. If a common carrier accepts property for transportation when he knows, or by the exercise of ordinary care should know, that it is likely to be exposed to injury because he has not suitable facilities for its transportation, he is liable for the resultant loss.—*Wahle v. Great Northern Ry. Co.*, 326.

Same—Acceptance for Transportation—Care Required.

8. Plaintiffs, in order to make out a *prima facie* case against defendant carrier, were required only to show that they delivered the livestock to defendant, that it failed to carry the animals to their destination and deliver them, and that loss resulted; the burden was then upon defendant company to prove that at the time of its acceptance of the property for carriage it could not by the exercise of ordinary care have known or anticipated that it could not discharge the obligation thus assumed; and the fact that after acceptance of the animals its road was disabled by unprecedented floods was no defense, if from information at hand it should have foreseen that event.—*Wahle v. Great Northern Ry. Co.*, 326.

REAL PROPERTY.

Rent,—see Landlord and Tenant, 1.

Rights of owners of real property abutting streets,—see Cities and Towns, 10, 12.

Parol License—Revocability.

1. A parol license (not coupled with an interest and for which not any consideration had been paid), to erect a dam on, and construct an irrigation ditch over, the licensor's land, is revocable at the latter's will at any time even though acted upon and the licensees expended money in reliance thereon.—*Archer et al. v. Chicago, M. & St. P. Ry. Co.*, 56.

Same—Revocation—Acts Constituting.

2. An appropriation of premises to a use inconsistent with the enjoyment of a parol license constitutes a revocation of it.—*Archer et al. v. Chicago, M. & St. P. Ry. Co.*, 56.

Same—Revocation—Notice.

3. Notice of the revocation of a parol license is only necessary where the licensors have removable property upon the premises.—*Archer et al. v. Chicago, M. & St. P. Ry. Co.*, 56.

Same—Revocation—Acts Constituting.

4. A parol license to erect a dam and construct an irrigation ditch on and over the licensor's lands was revoked by his action in granting a right of way to a railroad company for a grade embankment, the natural consequence of the maintenance of which was to injure the dam and ditch at high-water season; hence any damage in this respect constituted *damnum absque injuria*.—*Archer et al. v. Chicago, M. & St. P. Ry. Co.*, 56.

RECEIVING STOLEN PROPERTY.

See Criminal Law, 1-6.

REHEARINGS.

See Appeal and Error, 8.

REPLEVIN.

See Claim and Delivery.

RES ADJUDICATA.

Judgments.

1. A litigant has no right, as against the same adversary, to have a question, either of law or fact, relating to the same cause of action, twice adjudicated in the same or another court of like jurisdiction, unless a re-examination of it has been regularly ordered.—*Dunseth v. Butte Electric Ry. Co.*, 14.

Judgment on Directed Verdict.

2. Plaintiff brought an action in the circuit court of the United States against a street railway company to recover damages for personal injuries. The judgment in that court recited that, after the impaneling of a jury, evidence was submitted by both parties, and at its conclusion a verdict was directed in favor of defendant. Plaintiff subsequently instituted suit in the state court on the same cause of action against the same defendant. *Held*, that the judgment in the federal court was upon the merits, and a bar to the action in the state court.—*Dunseth v. Butte Electric Ry. Co.*, 14.

SALES.

Of corporate stock, breach of contract,—see *Brokers*, 1.

Whether transfer of personal property constitutes pledge or sale,—see *Corporate Stock*, 1-6.

SAWDUST.

Dumping into streams,—see *Injunction*, 2, 3.

SECRETARY OF STATE.

Foreign corporations, filing fees of certificates,—see *Corporations*, 2.

SELF-DEFENSE.

See *Criminal Law*, 23-25, 27, 32.

SHERIFFS.

Duty of, in claim and delivery,—see *Claim and Delivery*, 1-3.

SIDEWALKS.

Defective,—see *Personal Injuries*, 28-30.

Replacing of, injunction,—see *Cities and Towns*, 15-21.

SPECIAL INTERROGATORIES.

See *Jury*, 1-4.

STATUTE OF FRAUDS.

Corporations—Officers—Authority—Jury Question.

1. Whether the president of a corporation, who, in requesting a merchant to furnish supplies to one who had contracted to cut timber for the company, had stated that he would see that the goods would be paid for, intended to bind himself or his principal, was a question for the jury's determination from all that was said and done and from all other surrounding facts and circumstances.—*McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

Original or Collateral Promise—How Determined.

2. Where the question whether a promise was original or collateral depends solely upon the words used, the nature of the promise is a question of law for the court; where, however, the language of the

promisor was used with reference to facts and circumstances tending to throw light upon the intention of the parties at the time, the question whether the promise was original or collateral to the promise of a third person becomes one of fact for a jury's determination.—*McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

Same.

3. In determining whether a promise was original or collateral to that of a third person, it is proper to inquire, among other things, whether the promisor had any immediate pecuniary interest in the transaction between the promisee and the person for whose benefit the promise was made.—*McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

Same—Evidence.

4. While evidence that goods sold were charged to the person to whom they were delivered tends strongly to show that the seller gave credit and looked to him for payment, thus making the promise of another to answer for the debt a collateral one, it is not conclusive but open to explanation.—*McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

Same.

5. To make an oral promise to be answerable for the price of goods, delivered to another, original so as to take it out of the statute of frauds, credit must have been given exclusively to the promisor; but it is not necessary that the party for whose benefit it was made should be released from liability. It is only where one agrees to pay the pre-existing debt of another that the latter principle is applicable.—*McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

Same.

6. The fact that plaintiff in a letter to defendant had styled the latter a "guarantor" of an account for goods sold and delivered to a third person, which it was sought to collect upon the theory that defendant company, through its president, had promised to pay it, was not a determining factor in solving the question whether the alleged promise was original or collateral.—*McGowan Commercial Co. v. Midland C. & L. Co.*, 211.

STATUTE OF LIMITATIONS.

Contracts not Founded on Writing—"Obligation."

1. Pending a deal for the purchase of real property, plaintiff paid to defendant \$5,000 on the purchase price. Before the negotiations had ripened into a contract they failed, and defendant returned \$4,000 of the money paid, but refused to turn over the balance. There was not any agreement between them that all the money should be returned to the prospective purchaser in case the transfer was not made. The action to recover the balance of \$1,000 was not brought until more than three years had elapsed after payment of the money to defendant. *Held*, that the action was one upon an "obligation," within the meaning of subdivision 3 of section 6447, Revised Codes, which provides that an action upon an obligation, not founded upon an instrument in writing other than a contract, etc., must be commenced within three years, and hence was barred under said section.—*Schaeffer v. Miller*, 417.

Personal Injuries—"Liability Created by Statute."

2. *Held*, that an action brought under Chapter 23, Laws of 1905, p. 51 (Revised Codes, secs. 5248-5250), to recover damages for injuries to a mine employee, does not fall within the category of those founded "upon a liability created by statute," mentioned in

section 6449, subdivision 1, as being barred unless brought within two years.—Beeler v. Butte & London C. Dev. Co., 465.

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STATUTES AND STATUTORY CONSTRUCTION.

Statutes Creating New Liability—Pleading and Proof.

1. To enable a person to recover under a statute creating a liability where none existed before, he must not only plead facts bringing his cause of action within its purview, but prove them as alleged.—*Wiley v. Northern Pacific Ry. Co.*, 51.

Statutory Construction—Effect of Amendments.

2. Where, at the time of the enactment of a statute, the Codes contained a provision touching the same subject, the later legislation must be construed as controlling in so far as it is inconsistent with the earlier enactment.—*State ex rel. Floyd v. District Court*, 357.

Same—Constitutionality.

3. If possible, a statute must be so construed as to uphold its constitutionality.—*State ex rel. Floyd v. District Court*, 357.

Inheritance Taxes—Statute—Constitutionality.

4. *Held*, that the statute providing for an inheritance tax (sections 7724-7751) is not unconstitutional on the alleged ground that it fails

to provide for notice to nonresident distributees of the appraisement of the estate for the purpose of fixing the tax, but that under sections 7738 and 7741, such a reasonable notice is provided, and an opportunity to be heard given, as not to leave the legislation open to the objection that it fails to provide due process of law.—*State ex rel. Floyd v. District Court*, 357.

STREET RAILWAYS.

See, also, Personal Injuries, 21-24.

Use of streets by,—see Cities and Towns, 9-13.

STREETS.

Dedication,—see Cities and Towns, 1.

Public use,—see Cities and Towns, 11.

Rights of abutting owners,—see Cities and Towns, 10, 12.

Use of, extent of powers of council,—see Cities and Towns, 9.

SUPERVISORY CONTROL.

See Contempt, 2-4.

SURETIES.

See Claim and Delivery, 1, 2.

SURPLUSAGE.

In charging offense of receiving stolen property,—see Criminal Law, 4.

SURVIVAL OF ACTIONS.

See Personal Injuries, 10, 31, 36, 37.

TAXATION.

See Inheritance Taxes.

THEORY OF CASE.

Issues—Review.

1. Respondent cannot be said to have acquiesced in the trial of a cause upon the theory that it included an issue not made by the pleadings, by permitting evidence to be received without objection, where the purpose of offering the evidence was not explained at the time, and where it was apparently material and competent as bearing upon issues other than the one not raised by the pleadings.—*Neary v. Northern Pacific Ry. Co.*, 480.

TITLE.

Proof of,—see Ejectment.

TOWNSHIPS.

Change of boundaries,—see Counties, 1, 2.

TRIAL.

Amendment of pleadings during,—see Amendments.

See, also, Discretion; Evidence; Instructions; Jury; Variance; Verdicts.

VACANCIES.

See Office and Officers, 1.

VARIANCE.

Personal Injuries—Pleading and Proof—Nonsuit.

1. The plaintiff in a personal injury action may recover only upon proof establishing substantially the cause of action alleged; hence where the evidence tended to show an act of negligence other than the one relied on in the complaint, the court properly granted a nonsuit on the ground of variance.—*Thurman v. Pittsburg & Mont. Copper Co.*, 141.

Same—Failure of Proof.

2. Plaintiff alleged in his complaint against a street railway company that while he was at his destination and in the act of stepping off defendant's car (thus implying that the car had stopped), it was negligently started with a sudden jerk, causing him to be thrown to the ground and injured. The testimony showed that while the speed of the car had slackened, it did not stop, but, having run by his destination at a slow rate of speed, suddenly accelerated its speed, causing plaintiff to fall. *Held*, that there was such a variance as amounted to a failure of proof.—*Knuckey v. Butte Electric Ry. Co. et al.*, 314.

Same—Failure of Proof—Nonsuit.

3. The complaint in an action to recover damages for the death of a coal miner who, while attempting to rescue a fellow-workman, was himself overcome by poisonous gases and died from the effect of their inhalation, charged that the death of decedent was due to the accumulation of gases spontaneously generated in unused workings entered by him; the evidence disclosed that the gases from the inhalation of which deceased died, were generated by a fire in the mine. *Held*, that there thus appeared between the cause of action alleged and the evidence adduced to establish it, such a variance as amounted to a failure of proof, and that a motion for nonsuit was properly granted.—*Bracey v. Northwestern Improvement Co.*, 338.

Criminal Law—Receiving Stolen Property—Failure of Proof.

4. In a prosecution for the crime of receiving stolen property, its ownership must be proved as alleged; hence where the ownership, as laid in the information, was jointly in three persons named, and the evidence disclosed that most of the articles belonged to one of them, and the remaining ones to the other two individually, there was such a variance as amounted to a failure of proof.—*State v. Moxley*, 402.

VENUE.

See Contracts, 3.

VERDICTS.

Directed verdict, judgment on,—see Judgments, 1, 2.

Appeal—Conflicting Evidence—Verdict—Conclusiveness.

1. The verdict of the jury will not be disturbed on appeal on the alleged ground that the evidence is insufficient to justify it, where from the testimony before them they could have found the issues in favor of either party.—*Poor, Admr., v. Madison River Power Co.*, 236.

Damages—Evidence—Sufficiency.

2. Evidence relative to plaintiffs' damages *held* to furnish some tangible basis for an estimate by the jury, and that while the verdict

was for an amount much less than that fixed by the only witness who testified in relation thereto, it should not be set aside on the ground that there was no evidence to support it.—*Wahle v. Great Northern Ry. Co.*, 326.

Excessive—What Does not Constitute.

3. A verdict of \$25,000 as damages for the negligent killing of a freight train conductor, whose expectancy of life was twenty-nine years, and whose monthly earnings had been \$150, *held* not excessive. Where a verdict claimed to be excessive is capable of being arrived at by mathematical calculation, the elements of passion and prejudice will not be presumed to have influenced the minds of the jurors. *Neary v. Northern Pacific Ry. Co.*, 480.

How to be Construed.

4. The verdict should be given such a reasonable construction as will carry out the obvious intention of the jury; and, in arriving at such intention, reference may be had to the issues made by the pleadings, the instructions to the jury, and the evidence introduced at the trial.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

Ejectment—Issues—Withdrawal from Jury—Decision by Court—Verdict—Sufficiency.

5. Where the court in an action in ejectment instructed the jury that the evidence conclusively established title and right of possession of plaintiff, and that they should find in its favor for the restitution of the premises, and for such damages as the evidence showed plaintiff to have suffered, thus virtually, though not formally, withdrawing from the jury the issues of ownership, right of possession and ouster, and no complaint having been made that the evidence was not sufficient to authorize a directed verdict as to the issues thus withdrawn, a verdict in accordance with the instruction was not fatally defective for failing to also find upon the issues thus withdrawn.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

Judgment in Excess of Verdict—Modification.

6. Where the judgment in an action at law awards a larger measure of relief than is warranted by the verdict, it will be modified on appeal to conform to the verdict, a new trial not being necessary for that purpose.—*Consolidated Gold & Sapphire Min. Co. v. Struthers*, 565.

WAIVER.

Notice of entry of judgment,—see *New Trial*, 3.

Of defect in service of notice of appeal,—see *Appeal and Error*, 16, 17.

Of defense to liability of fire insurance policy,—see *Pleading and Practice*, 26.

Of redelivery bond in claim and delivery,—see *Claim and Delivery*, 3.

Of sufficiency of proof of death,—see *Insurance*, 3.

What Constitutes.

1. The term "waiver" implies the abandonment of a right which can be enforced, or of a privilege which can be exercised; hence, there cannot be a waiver, unless at the time it is alleged to have been exercised the right or privilege to be waived was in existence.—*State ex rel. Drifill v. City of Anaconda*, 577.

Fire Department—Removal of Member—Charges in Writing.

2. Plaintiff was removed from his position as a paid fireman, without any charges having been preferred, a hearing had and the accused found guilty, as prescribed by section 3328, Revised Codes. He subsequently petitioned the city council for reinstatement. *Held*,

under the rule declared in paragraph 1 above, that plaintiff's action in asking for reinstatement after his discharge did not constitute a waiver of his right to be confronted with written charges as one of the conditions precedent to his removal.—*State ex rel. Drifill v. City of Anaconda*, 577.

Criminal Law—Preliminary Examination.

3. A voluntary waiver of a preliminary examination by defendant charged with homicide has the same legal effect as though a hearing was had.—*State v. Byrd*, 585.

WATERS AND WATER RIGHTS.

Dumping sawdust into streams,—see Injunction, 2, 3.

Stored Waters—Rights of Owners.

1. So long as water to the amount to which ditch owners are entitled is allowed to flow to the headgates of their ditches, they may not complain of the use of the water by others above them, whether they divert it from the sources of the stream or from water stored by them in a reservoir.—*Kelly v. Granite-Bimetallic C. Min. Co.*, 1.

WILLS.

Probate of—Improper Influence—Evidence—Insufficiency.

1. Where, on the contest of a will before probate, there was no evidence whatever that the making and execution of the instrument were not the free and voluntary acts of the deceased, a finding by the jury to that effect was unwarranted.—*In re Hobbins' Estate*, 39.

Same—Want of Testamentary Capacity—Insufficiency of Evidence.

2. Testimony that testator had, in a will executed one day prior to the one offered for probate, described himself as being of the same age as he was eight years before when he had made another will, and that in the one offered he had left one dollar to a brother, when in fact he had never had a brother, was not sufficient in weight to overcome the positive and uncontradicted statements of witnesses, who were frequently present in the room of testator for forty-eight hours before his death and at the time of the execution of the will, and of others who had known him well for years, that, while he was in a weakened condition physically from the effects of disease, he was sound mentally and fully understood the contents of the will; hence the court erred in adopting a finding of the jury that deceased was not of sound and disposing mind when he made the will.—*In re Hobbins' Estate*, 39.

Same—Validity of Will—Who may Question.

3. The fact that testator in a prior instrument had left all of his property to a nephew did not deprive a sister of deceased of her right to contest the probate of a subsequent will, which revoked all former ones; under such conditions any heir at law was in a position to call the validity of the instrument in question.—*In re Hobbins' Estate*, 39.

Same—Issues—Jurisdiction.

4. In proceedings looking to the probate of a will, the district court is without jurisdiction to determine the validity or invalidity of specific bequests or devises; such issue must be tried and adjudicated in appropriate proceedings instituted after the will is formally admitted to probate.—*In re Hobbins' Estate*, 39.

Same.

5. *Held*, under the rule stated in paragraph 4, *supra*, that the district court erred in determining that in making the contestee the

principal beneficiary under the will sought to be probated, testator did so with the understanding that she should take the property as trustee for a charitable organization, and in denying probate on the ground, among others, that the instrument was void under sections 4761 and 4762, Revised Codes, providing that a legacy or devise to any charitable institution, or to any person in trust for charitable uses, not made within thirty days before the death of testator, is invalid.—*In re Hobbins' Estate*, 39.

WORDS AND PHRASES.

"Boss"—

Johnson v. Butte & Superior C. Co., Ltd., 170.

"Buyer-ten" contract—

Welch v. Nichols, 440.

"By virtue thereof"—

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"*De facto* officer"—

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"*Id certum est quod certum reddi potest*"—

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"Judgment"—

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"Liability created by statute"—(Rev. Codes, subsec. 1, sec. 6449).

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"Obligation"—

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"Such" persons—(Rev. Codes, sec. 7738.)

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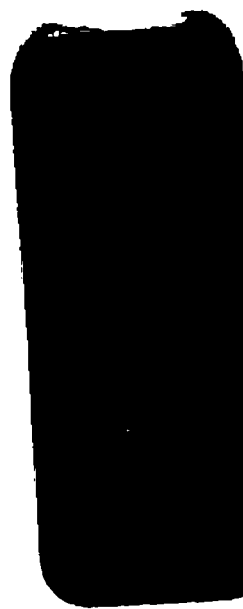
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